Property of: Ness, Motley
Main PI File Room
Charleston, SC

Volume: XVI
Pages: 1-198
Exhibits: See Index

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

- x

JOANNE KOTLER, Individually and as Administratrix of the Estate of GEORGE P. KOTLER,

Plaintiff,

v.

Civil Action No. 86-0810-S

THE AMERICAN TOBACCO COMPANY, PHILIP MORRIS, INC. and LIGGETT GROUP, INC.,

Defendants.

- x

BEFORE: Honorable Walter Jay Skinner

Held At:

John W. McCormack
Post Office and Courthouse
Boston, Massachusetts
Tuesday, March 6, 1990
9:05 a.m.

DORIS M. JONES & ASSOCIATES, INC.
Professional Shorthand Reporters
59 Temple Place
Boston, Massachusetts 02111
(617) 542-0039

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

APPEARANCES:

NISSEN & LUMSDEN
By Eric Nissen, Esq., Diana Lumsden, Esq.
and Garry V. Inge, Esq.
One Court Street
Boston, Massachusetts 02109
For the Plaintiff.

GASTON & SNOW
By Andrew F. Lane, Esq.
One Federal Street
Boston, Massachusetts 02109
For American Brands.

CHADBOURNE & PARKE
By Thomas E. Bezanson, Esq.
Bruce Sheffler, Esq.
30 Rockefeller Plaza
New York, New York 10112
For American Tobacco Company.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

I N D E X

WITNESSES:

PROFESSOR OTIS GRAHAM

(Cross by Mr. Nissan) 25

(Redirect by Mr. Lane) 136

(Recross by Mr. Nissen) 160

EXHIBITS:	DESCRIPTION	FOR ID.	IN EVID.
DEFENDANTS' EXHIBITS:			
14	Medical records of George Kotler		169

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. LANE: Presumably continuing cross of Doctor Graham.

MR. INGE: Assuming Mr. Nissen is right outside the door.

THE COURT: I saw him recently.

MS. LUMSDEN: There he is.

THE COURT: Let's bring the jury in.

(End of side bar conference.)

(Jury present at 9:32 o'clock a.m.)

THE COURT: Good morning, ladies and gentlemen.

I'll tell you what happened to Mr. Connolly, who was the alternate juror, he didn't appear on Friday. He made it here yesterday.

The reason he didn't appear on Friday was that he was jumped at an MBTA station and beaten up and robbed, and he showed up here with his arm in a bandage. And luckily he is apparently not seriously injured, but in any case I had to excuse him because he did not hear the testimony on Friday, and he looked as if he could use a little rest actually.

But I just thought you might be curious as to why he suddenly disappeared from the scene, and that's why. A very unfortunate circumstance.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Now, since Friday, have you spent some additional time working on your opinions in this case?

A. Not working on my opinions, but I have spent some work time.

Q. What type of work time?

A. Two sorts of work.

I left here on Friday, I joined my family, they are in a place in California where they were having a reunion. I was only with them a few hours.

I went to Santa Barbara and I packed up my research materials, that was work, put them all in boxes, three big heavy boxes, and then I caught a plane. The plane was delayed in San Francisco for fog, and I didn't get in until yesterday morning.

I took a short nap, and I worked in the afternoon with the lawyers on packing my boxes which were mine and explaining the contents.

Q. What lawyers did you work with?

A. The lawyers for American Tobacco Company.

Q. And what are their names?

A. I told you I'm bad on names, Counsellor, but they are seated at that table.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

In any case, we will proceed now with the continuing cross examination of Otis Graham.

PROFESSOR OTIS GRAHAM,

having been previously duly sworn, was examined and testified further as follows:

CROSS EXAMINATION

CONTINUED BY MR. NISSEN:

Q. Good morning, Mr. Graham.

A. Good morning.

Q. Since Friday, Mr. Graham, have you been back to Santa Barbara?

A. I have.

Q. And when did you get back to Boston?

A. I got back to Boston about 10:00 o'clock or 10:30 yesterday morning after taking the night flight from California.

Q. By the way, Mr. Lane has talked about Santa Barbara, your being from San Francisco. Santa Barbara --

A. I'm from Santa Barbara. I was in San Francisco Airport, sometimes I go through there.

Q. Santa Barbara is Southern California?

A. Right.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. This table here?

A. Yes.

Q. This morning were you also meeting with another lawyer, Mr. Andy Myne?

A. Yes.

Q. From Chadbourne & Parke also?

A. Yes.

Q. Mr. Graham, what's the name of the research firm that obtained the newspaper and magazine articles that you were given by the attorneys?

A. PHR Associates.

Q. PHR?

A. PHR.

Q. Where are they located?

A. They are located in Santa Barbara, California.

Q. And do you use that firm yourself?

A. I had never used that firm myself before this occasion.

Q. I see.

And how did you hear about this firm?

A. Well, I knew about this firm before this case, because the firm, the principal in the firm, the founder of the firm, one of the founders of the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

firm was once a graduate student of mine. I was not her primary doctoral dissertation advisor, but she was a graduate of mine years ago.

She then founded a firm in Santa Barbara, an independent historical research firm. I was aware she was downtown and doing rather well.

Q. How much do they charge an hour for their time?

A. I do not know.

Q. And how many hours of research did they perform on this job?

A. I do not know.

Q. You told his honor Friday that you spotchecked the research that this group performed.

You weren't aware of how many hours they spent putting together the materials?

A. I am not aware and have not been aware of the exact number of hours that they put in.

I did verify their work, however, as a matter of prudence.

Q. Did you go through all the materials and duplicate the work that they did?

A. No. That would not be the right way to characterize my verification procedure.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Did you personally select this firm?
A. No, I did not.
Q. The lawyers selected the firm?
A. Yes.
Q. Mr. Graham, did you utilize any assistants, students or anyone else to help you in your assignment?
A. Yes. As I very often do, I utilized graduate students as research assistants.
Q. And did they go through the materials?
A. At my direction, they worked for me selecting original materials according to a plan that I devised, and I supervised them, and they also assisted me when it came time to do the verification to be sure that the materials we were getting were sound and were -- the database that we assumed they were. They did some of that work under my direction, yes.
Q. How many hours did they spend?
A. I have not totaled up the hours, but my research assistants for the last -- over the long period of this project, I have it in my files because they billed me. I could make a guess. I would guess two times what I did. Let's say they

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

did five, four, 500 hours. I sent them off on a lot of things, and made good use of them.

Q. How much was that bill?

A. Mr. Nissen, I have not -- not anticipating that question I didn't go through my records to add up the amount of -- I pay them the going rate, I pay them the going rate, and it's between eight and $10 these days, an hour.

THE COURT: Did you past that on to the law firm?

THE WITNESS: Yes, sir.

THE COURT: So they paid that in addition to your pay?

THE WITNESS: Yes, sir, I passed those bills on.

BY MR. NISSEN:

Q. Now, you told the jury that you made a number of trips to Washington, New York, Boston.

Were there any other trips you made in conjunction with your testimony last Friday?

A. In Washington I frequently visited the library of Congress. I went at least once to UCLA library, perhaps twice. But I believe those are the extent of my trips, unless I've forgotten one.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Sure.

Mr. Graham, do you know a Doctor Ludmerer? Have you talked with him?

A. I have never talked with the gentleman. I know that he is a historian, a respected one. I saw him for the first time in this courtroom, and I have never spoken with him.

Q. Do you know whether Doctor Ludmerer used the same research firm as used in your instance?

A. I have no way of knowing. I've never spoken with the gentleman or communicated with him in any way.

Q. Mr. Graham, prior to your appearance Friday, you told us that you were in court some five separate times, is that correct?

A. In this courtroom?

Q. In this courtroom.

A. Whatever I told you on Friday was my best recollection. I would have said myself it was three or four, but I've been in here several times, not all the time, but I've sat back there.

Q. And you watched some of the witnesses testify?

A. I saw two that I recall. I saw Doctor

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

Young.

Is that the right name?

Q. I don't think there was a Doctor Young.

A. I saw a medical doctor, I saw two doctors, Doctor Ludmerer was one, and the other was a gentleman you had here whose name I can't recall either. So I saw two witnesses.

Q. You were asked to see them by the attorneys?

A. It was suggested that I might want to come to the courtroom and get a little more accustomed to a courtroom. It's new for me. And Doctor Ludmerer's testimony, I was very interested in it, it's historical. I was hearing it for the first time.

Q. Is it your testimony that you were here five separate occasions to get accustomed to the courtroom?

MR. LANE: Objection, your Honor. Objection.

THE COURT: Overruled.

A. However many times I was here and said that I was here, I was here to get accustomed to the courtroom, and then one gets interested in the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

issue. I was especially interested in Doctor Ludmerer, but the entire proceeding is of interest to me.

BY MR. NISSEN:

Q. Were you interested in Doctor Eugene Mark?

A. I don't believe that was the name of the -- I don't believe I was here for that. I know the face and the figure of the doctor I sat through, and I don't believe that that was his name.

Q. Why don't you tell us what he looked like.

MR. LANE: Objection.

THE COURT: The doctor that he saw.

A. He was a smaller man, and he sat very still. And I'm trying to recall, I use the word Doctor Young, that's obviously not ringing a bell with you.

BY MR. NISSEN:

Q. I don't believe it does.

A. He treats some patients and he talked about addiction. I just happened to be here when he was talking. It was interesting.

Q. Doctor Hughes?

A. Hughes, thank you, that's who it was without question.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Mr. Graham, prior to your testimony Friday, you met with lawyers on a number of separate occasions, correct?

A. Yes.

Q. And during any of those sessions, was your testimony videotaped?

A. No.

Q. You reviewed the questions that you were asked Friday prior to your testimony, correct?

A. Put that again. I want to understand.

Q. You reviewed with Mr. Lane the questions that you would be asked prior to appearing on the stand Friday?

A. I reviewed a range of questions that I might be asked.

Q. And how long before Friday did you go over those questions?

MR. LANE: With me?

MR. NISSEN: With any lawyer. Let's start with Mr. Lane.

A. In talking with the lawyers, they asked questions from time to time, I'd give answers, and it's never been clear to me which of those questions were exactly questions which were specifically going

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

to be asked here.

I would say a couple of days. It's hard to tell.

BY MR. NISSEN:

Q. Did you bring the manila files with you that you had?

A. Yes, I did.

Q. Can we see those?

A. Yes, I suppose.

THE COURT: Sure.

A. (Handing).

BY MR. NISSEN:

Q. Thank you.

Mr. Graham, are there any other notes that you had in court Friday that you haven't brought with you here today?

A. I don't believe so.

Q. Are these the files that you had?

A. I have not changed them. I hope that they are exactly the same.

Q. And looking at them, I see they have some numbers on them, is that correct?

A. They are numbered so that if I dropped them I could get them back in order.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Okay. When Mr. Lane asked you questions, Mr. Graham, you went through these files one by one in the order that they were in, isn't that correct?

A. I established this order myself, and I didn't want to get it out of order because the order is crucial to the story. It's for that reason that I'm very careful about the order.

Q. You knew that the questions that were going to be asked were the exact order congruent with these files, correct?

A. The questions don't come first, Mr. Nissen. First comes the evidence, which I arranged, and I arranged it exactly as I wanted it. Then it was their job to ask questions and mine to arrange the evidence and to keep it in order so that the order would be as I wished it.

Q. This is evidence, Mr. Graham?

MR. LANE: Objection.

A. I mischaracterized it.

This is the data, this is the history, these are the examples that I chose to bring to the jury and to the court, my own synthesis of this history as it unfolded of the debate in the media over the medical research reports. That order is

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Downloaded from www.industrydocuments.ucsf.edu/docs/sxxl0001

mine, and I'm very particular about that order.

BY MR. NISSEN:

Q. I see. You're particular about this.

This is your synthesis, Mr. Graham, of the debate, is that your testimony?

A. That would be, yes, that would be a way to put it. It is my synthesis of this discussion in the public media of these medical research reports and their implications.

Q. Mr. Graham, on Friday you told the jury that your assignment was to start from the fifties because, and I think these are your words or basically your words, the history of cigarette entered a new phase, is that correct?

A. Those three words are my words. I remember them. The history of the cigarette entered a new phase in 1950. Yes. Those are my words.

Q. And you did some search, Mr. Graham, into the forties as well?

A. Yes.

Q. And if you heard Doctor Ludmerer, you probably would have heard testimony that in his view there wasn't much credible medical evidence in the forties supporting the link between lung cancer and

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

cigarette smoking?

A. I heard him say that.

Q. And there wasn't much in the popular press in the forties about the link between lung cancer and cigarettes?

A. Not much would be an accurate statement.

Q. Now, Mr. Graham, part of your assignment, and, in fact, your goal was to find out what the information environment was in existence when George Kotler was growing up and in the fifties and up to 1964, correct?

MR. LANE: Objection.

I don't think that was his testimony.

THE COURT: Well, he can be inquired of in cross examination.

Was that your assignment?

THE WITNESS: No. I would not have put it that way at all. I don't -- I would say two things in disagreement with that characterization.

BY MR. NISSEN:

Q. Okay.

A. First I don't know what you mean by information environment.

My assignment was to study and understand

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

and then recount, recapture and recount, a debate in the public media over medical research reports. I had no -- George Kotler was not a part of my assignment. My assignment was a public debate. If that's responsive.

Q. Thank you.

Wasn't it your goal to get to the bottom line of what information was out there for the public including George Kotler?

A. For the public including George Kotler, not all scraps of every information from every source. I determined that -- and it's a major task to do even this, that I would try to recapture and understand and then communicate all the information in the public media and the mass circulation media about this question, and that's quite an assignment in itself.

Q. There are many major newspapers in the nation, aren't there?

A. Many.

Q. There are many major magazines in the nation, aren't there?

A. Many.

Q. And you went through these carefully, you

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

or this research group, went through these carefully to arrive at an even-handed analysis of the information available in those media, did you not?

A. That is correct. We went through selected ones very -- they went through carefully, I determined that they had gone through carefully, and then I went through very carefully.

Q. And you were satisfied that you had an even-handed view or representation of what was in the media available to the public in this nation and in East Cambridge, as a matter of fact?

A. Yes. I would not have reached my conclusions had I doubted that I had reached an understanding through research in those sources of what the story really was.

Q. And in that search before this jury Friday, you brought a number of articles blown up on posterboards from the New York Times, correct?

A. There are several articles from the New York Times that I selected as illustrative of an important turn in the discussion, or an important event in development in the discussion.

Q. Let me direct your attention to November 27th, 1953, and ask you whether you read this quote

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

from the New York Times from Paul Hahn, president of the American Tobacco Company. In this article Mr. Hahn called a recent scientific report suggesting causation of cancer a lot of, quote, loose talk. "Believing as we do that cigarette smoking is not injurious to health I feel that a statement of reassurance to the public should be made. What the public wants to know about is whether it is true that smoking has been proved to contribute to the incidence of lung cancer. The fact, of course, is that it has not been so proved. With all respect to the sincerity of those who have been working in the field of lung cancer research, there has been much loose talk on the subject as reported in the press during recent months."

Did you read that to the jury?

A. Could I see that, please?

Q. Certainly (handing).

A. Yes, I saw that in my research.

Q. You didn't read that on Friday, did you?

A. Oh, there's so much I didn't bring in, so much, thousands of items. This is one of thousands.

Q. That's one of them?

A. That's one of them.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Let me direct your attention to another New York Times article. December 10th, 1953. Harris Parnell, the director of research at Lorilard Company, another tobacco company, would you agree with that?

A. Sounds like it.

Q. Made by Doctor Wynder and Ochsner, you know those names?

A. I do.

Q. And Mr. Parnell said "even the most biased individuals were among the ones most widely quoted must admit that the evidence produced to this date is only suggestive and by no means convincing."

Did you read that to the jury?

A. Could I see that, please?

Q. You certainly may (handing).

A. This is from the New York Times. Yes, I recall this. I read this newspaper so thoroughly. I remember this. It's a little hard to see the top part.

Q. You didn't read that Friday, did you?

A. Oh, this is another one of the thousands that I could not bring forward to read.

You could continue to do this until you'd

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

exhausted thousands of articles.

Q. Did you quote any tobacco company spokesman to this jury on Friday? Yes or no.

A. I do not think that I did, and I have my reasons for that.

Q. You'll have your chance to explain it.

December 12th, '53, "R.J. Reynolds agrees with the American Tobacco Company in what they call 'loose talk.' The Reynolds Tobacco Company said there was no real or substantial evidence showing that cigarettes caused cancer."

Do you remember that article?

A. I actually remember that one, the term "loose talk" sticks in my mind.

Q. All right. That's yet another tobacco company making a statement in the press, correct?

A. You found three, Mr. Nissen, that's true.

Q. Well, let me suggest a fourth.

January 4th, 1954, "in an effort to allay public fears that tobacco is supported by tobacco companies including the American Tobacco Company denied conclusiveness of experiments establishing a smoking health link."

And at that time among the quotes they

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

said "the products we make are not injurious to health."

Did you tell the jury that on Friday?

MR. LANE: Objection.

I don't have the article.

MR. NISSEN: The language of the article.

BY MR. NISSEN:

Q. January 4th, 1954. Do you remember that article?

A. Could I see it?

Q. Certainly (handing).

A. This is the New York Times? Yes, yes. I'm sure I saw that.

Q. You didn't read that?

A. That's another one of the thousands that I did not read for good reason, I believe, in my judgment.

Q. In your judgment.

You wanted to tell the jury both sides of the story, the story from medical authorities and the story from the tobacco representatives, wouldn't that be fair to say?

MR. LANE: Objection.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: Overruled.

A. I wanted to tell the jury how the controversy developed and the course of the controversy, how it went through the public media.

The controversy was generated by medical research reports, it was generated by doctors and scientists. They made the initial -- they did the work, the initial work, they created the controversy and framed it and gave it its direction and gave it its major themes.

Then they began to argue with each other and among each other, and that was the main channel of conversation. Occasionally people would -- other people, public officials, congressmen and public health officials would comment, when they made a major comment, if I regarded it as a major comment when I came down to my 35, and believe me this is a very condensed synthesis of the essentials, I couldn't put in everything, I put in the main spokesmen, the people who were carrying the argument forward.

In the 35 articles I believe there are five or six statements by the industry, when the industry got itself together in the form of -- after

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

1954 for the first four years there was no industry point of view that you could -- as such.

After 1954 the industry had a committee, the Tobacco Industry Research Committee, very rarely they would be listed in a story.

You have diligently found four. They would occasionally, and I would say not more than ten or fifteen percent of the cases, say something derivative. They would echo, they would say more research. The main thing the scientists were saying, more research, so I tried to distill out what the scientists were saying on both and all sides of the question.

This is an echo. There were many echoes, and some of the industry point of view is in these articles.

As you remember, I didn't read all the articles, the jury could hardly have sat for all of that, but they are in these files.

Q. They are in those files?

A. Yes. I remember that there are four or five, I would say, comments such as this at the bottom. I remember two, I remember two. The Boston Globe, I brought it in, the Boston Globe, if you'd

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

allow me I would indicate. I just remember this in 1957, the Hammond and the Horne, the very important moment in the controversy, Hammond and Horne had new information, and there's an article in the Boston Globe, I cited it. I just highlighted the top sentence. It was the only sentence that I thought you had time to hear, and it's the key to what Doctors Hammond and Horne had found.

At the bottom of the article, Mr. Nissen, it says, the article says many things that I didn't quote. Right at the bottom you'd sometimes find this. I was surprised by how infrequently, frankly, we found this kind of industry voice. Here you did, this day at the end of the story the reporter got ahold of -- I'll read this if I may.

Almost simultaneously with the release of the report the Tobacco Industry Research Committee issued a statement declaring, quote, the causes of cancer and heart disease are not yet known to medical science.

They said that every time. Doctors were saying this. Lots of the doctors were saying the same thing. Today's Hammond/Horne statistical statement, like the previous report the tobacco

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

committee added, does nothing to change this fact.

And there is at least one other place that I remember, and probably two or three more in which that minor note, it's an essentially minor note, I was surprised to find how minor the note was.

Q. Your testimony is it was minor, and there were just several of them that you found, is that correct?

A. I would estimate of the over, I don't know, over 1,000 news stories that I looked at, ten percent, fifteen percent at the most, you'd find the reporter finally letting the industry say, and they always said the same thing, in a sense they are not a part of the debate, they weren't a part of the development of the argument, the doctors were part of the argument as it ebbed and flowed through the decade, the industry would always say when they had a chance to say something, they weren't particularly aggressive, and I was surprised by that.

Q. They weren't aggressive?

A. The Tobacco Industry Research Committee in my judgment.

Q. All right. Would it have been important to you in terms of the media information or was it just

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

minor that manufacturers or the representatives were making comments disputing findings of scientists?

A. If they had made the sort of comments that changed the course of the discussion, if they'd made intellectual contributions or major theoretical statements or reported major research that moved the discussion, I would certainly have selected it.

Q. That would be important to you, correct?

A. That would be important if they had done so. They would say more research is needed, the facts are not all in. This after a while got stuck at the bottom of ten or fifteen percent of the stories. It's not a major part of the way this developed in its dynamics.

Q. You know the name Doctor Clarence Cooke, don't you?

A. If you mean Doctor Clarence Cooke Little, I do.

Q. I'm sorry, Doctor Clarence Cooke Little, who was the director of the Tobacco Industry Research Committee.

I direct your attention to New York Times, February 25th, '54, Doctor Little is quoted as saying "if smoking in the lungs were a sure-fire

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

cause of cancer we'd all have had it long ago. The cause is much more complicated than that."

Do you remember that article?

A. I'm sure that is what he said. It sounds like some things that he said.

Q. Doctor Clarence Cooke Little was the head, the director, of the Tobacco Industry Research Committee.

Now, was that of some importance, a message coming from him to the public? Would you consider that important?

A. I would have to read that message, but as I heard it I would say Doctor Little was a distinguished scientist, he had been the president of the University of Michigan, he was selected to direct the research work of the committee, he was occasionally asked by a reporter to comment or he came forward to comment. Occasionally.

Doctor Little tended to say just that much, and not more. He did not put forward the results of research, he never put forward the results of research, he just said we're doing research, but he wouldn't report on it, and he would make short comments. And I did not regard them in

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

the brief time that I had, and in the brief compass that I had, they were not major intellectual contributions. He was directing the research, very complicated scientific research of the research committee.

Q. Well, were you aware that Doctor Little made numerous appearances before Congress and congressmen discussing his view disputing that lung cancer was caused by cigarettes? Were you told that?

A. I am aware that he spoke before Congress, but as you will remember testimony before Congress was not in my definition a part of the public discussion that the public or any citizen in Boston could be listening in on. I was interested in the conversation that people could listen in on.

Down in Congress they were doing a lot, but that was not my -- to research that was not my --

Q. That wasn't your concern?

A. No.

Q. How about Atlantic Magazine, you've heard of that?

A. Yes.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. All right. Do you remember reading a letter from Doctor Little in Atlantic Magazine?

MR. LANE: Objection, your Honor. There's no foundation. He hasn't identified whether the Professor looked at it.

THE COURT: That was the question, wasn't it, whether he'd ever seen it? Did you ever see that?

THE WITNESS: If you could let me see it.

BY MR. NISSEN:

Q. (Handing). July 12th, 1957.

A. I don't believe that I have seen that. And I can tell you my method with the Atlantic Magazine, I defined the mass circulation magazines that I would research closely, there are hundreds of American magazines, I did not attempt to read everything in every magazine. I think that is beyond any individual or team of people, so that I had to make choices and careful choices. I selected a core group of magazines, mass circulation magazines, five, I selected a core group of newspapers.

Then feeling that if I could possibly get

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

a broader view, I went through the Reader's Guide, which is an index to periodicals, I had my research assistants go through for fifteen years and underline for me the articles on cigarettes, smoking, cancer and tobacco and bring them to me. And from that I made a selection of those articles from influential magazines that looked to me to be an article that I should not miss, and I got several Atlantic articles in that type of search and read them and incorporated them in my view, because it's an important magazine, but I did not take the Atlantic Magazine as a magazine I would read every scrap in, so I seem to have misseed that one.

Q. This magazine was available in Boston at the time?

A. It was. I believe that magazine is published in Boston.

Q. Doctor Little in 1957, and I quote --

MR. LANE: Objection. He said he hasn't seen this particular article.

THE COURT: We haven't had the question yet.

What's the question?

MR. NISSEN: All right, your Honor.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Sorry.

BY MR. NISSEN:

Q. You testified Doctor Little was an eminent scientist, he was a spokesman or worked for the Tobacco Institute.

MR. LANE: Objection.

I think the record is Tobacco Institute Research Committee, Tobacco Industry Research Committee.

BY MR. NISSEN:

Q. I'd like to ask you if the following statement in your view that you tell us you missed would have any significance in terms of available public information about this debate or, as you say, controversy.

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

BY MR. NISSEN:

Q. "No new evidence has been produced since the Scientific Advisory Board of the Tobacco Industry Research Committee last stated its position on this question on May 1st, 1957. At that time I said that although anyone has the right to state an opinion on cancer causation the scientific advisory

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

board questions the existence of sufficient definitive evidence to establish a simple cause and effect explanation of the complex problem of lung cancer. This is most definitely our position today."

A. Could I see that?

Q. Certainly (handing).

A. Yes, it sounds like him. I'm not surprised at all. If the jury and the Court had had time, I love history and I would like to have brought you 500 or 1,000 articles and stretch this story out, but I had to drop this one out.

THE COURT: Let's go back to the question.

Do you remember the question?

A. Could you restate it?

BY MR. NISSEN:

Q. Certainly.

Would that statement by the head of the Scientific Advisory Board of the tobacco advisory panel be of any significance to you in terms of the information available to the public in 1957?

A. It is not a -- it's a statement consistent with several that I brought to you. I brought them

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

to you by scientists who said the same thing, this is not a major statement. If I'd had twice or three times the time I probably would have added that one. That's representative of what he was saying, and he kept saying that. But others said there was insufficient evidence.

I hope that I communicated to you in these examples a sense, among other things, that some people thought there was insufficient evidence. I did it through other speakers who were usually medical scientists.

Q. Mr. Graham, did you find in your search of the literature that there was a consistent communication by Doctor Little and other members of the Tobacco Institute sending a message that --

THE COURT: You've got the wrong group.

MR. LANE: Wrong group, your Honor. Tobacco Industry Research Committee.

BY MR. NISSEN:

Q. Yes, which was an arm of the Tobacco Institute.

THE COURT: Let's not get into that. Just ask the question in terms of the Tobacco

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

Industry Research Group.

THE COURT: Can you rephrase the question, start again?

MR. NISSEN: Sorry, your Honor.

BY MR. NISSEN:

Q. Mr. Graham, was it of significance to you that Doctor Little and other representatives of the -- and representatives of the Tobacco Institute consistently in the fifties disputed the cause or causal connection between cigarettes and lung cancer? Was that of any significance to you as you reviewed the literature?

MR. LANE: My objection is simply to the proper designation of who was speaking for whom.

THE COURT: We're talking about Doctor Little and others representing the tobacco industry, whatever, and I'll let the question stand. He's changed his question.

A. Doctor Little spoke occasionally for the Tobacco Industry Research Committee. Almost never did anyone else speak for this group. He smoke very infrequently, and I know from the testimony you mentioned in Congress, I've in fact read that, Doctor Little was almost passive about it, he did

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

not function in this debate as an aggressive theorizer, he occasionally spoke and he always said this minimal thing, he always said we need more research, and we are doing more research.

That's a minor note. He didn't try to be a major player. He was rather retiring. He was a scientist.

BY MR. NISSEN:

Q. Is your position that he was not aggressive enough?

MR. LANE: Objection.

A. I don't know what enough is or what he should have done. I'm just reporting as to how he came across to me as I read through this discussion. He was on the bottom saying one minor thing, and he was not an aggressive spokesman. He spoke clearly and he always said that.

BY MR. NISSEN:

Q. I direct your attention to the New York Times, March 31st, 1954. A Mr. Weisman, vice-president of Philip Morris quoted as saying, "there are many scientists who question the statistics and even doubt the fact that there is a health question involved in cigarette smoking. If

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

we had any thought of knowledge that in any way we were selling a product harmful to consumers, we would stop business tomorrow.

MR. LANE: What's the question?

BY MR. NISSEN:

Q. Did you read that?

A. It sounds like I did. And I could ask you to see it, and I have the feeling that if it was in the New York Times I'm sure I saw it.

Mr. Nissen, you're on to something that was --

THE COURT: Professor, please. The question and answer, question and answer.

BY MR. NISSEN:

Q. June 16th, 1954, Doctor Clarence Cooke Little, director of the Tobacco Industry Research Committee, commented on another cancer study, with respect to the possible relation Doctor Little says that, referring to the mice studies, "men are not mice. We need more facts."

Do you remember reading that?

A. I believe I do. You found another one.

Q. Okay. That's what, three now from Doctor Little?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

A. I think you found five.

Q. Thank you.

June 23rd, 1954, Doctor Little again commenting on the American Cancer Society five year survey which suggested a causal link. Doctor Little described that survey as preliminary.

Would that be of any significance to you in terms of what the public is learning during the fifties?

MR. LANE: Can I get a date and the article?

MR. NISSEN: June 23rd, 1954.

A. I could ask to see it, but I don't think I need to. He's saying the same thing that he always said, and it's not a major contribution to tell people that research is preliminary, it's not a major contribution, it doesn't move the thing along.

BY MR. NISSEN:

Q. Let me ask you this one then.

Let's go along just a few months to October 12th, 1954. Doctor Little is quoted again in the New York Times, this time he says "no convincing clinical or experimental evidence has yet to be brought forward that cigarette smoking is the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

positive cause of lung cancer."

Still not of any significance to you in terms of the information environment to the public?

A. I make the same answer, you're finding the same notes, you're finding it again. I could find you one in 1962, it's the same.

Q. These are minor notes, Mr. Graham, when the head of the Scientific Tobacco Commission is questioning every major medical study that comes along, those are minor notes for you?

A. No. If scientists are questioning the science and saying nothing conclusive is yet there, that's very important, and I brought forward many scientists who said this.

And also there are two, at least two places where I brought forward that Doctor Little said it. I think there are more than two there.

Q. Mr. Graham, this is not now scientists questioning scientists, this is tobacco, this is the tobacco representative questioning scientists, isn't that true?

A. Doctor Little would have resented that, and he spoke out quite often, and he insisted he is, Doctor Cooke Little, a scientist from Bar Harbor,

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

Maine, he was not a spokesman, he spoke as a scientist who wanted science to go forward at its own pace, and he was proud to be administering funds.

Q. How do you know he was proud to be administering funds?

A. He spoke at length in that congressional hearing, and his note was "our role in this is extremely beneficial and it's a challenge of my life toward the end of my life to be dispensing these funds from this industry into research. It's going to take a long time, but this is vital work."

Q. The challenge of his life for the decade of the fifties and into the sixties was to dispute every time he spoke out the causation link between cancer and cigarettes, isn't that true, Mr. Graham? Show us one instance where he didn't dispute it.

A. He disputed steadily, he and many others disputed steadily that a scientific conclusion had been reached in these days. He and many others said that.

Q. May 17th, 1955, again we hear from Doctor Little in the New York Times, at which time he said he would be surprised if a single agent ever were

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

found that would be an unfailing cause of cancer, so it's unlikely that cigarettes or any other agent would be so implicated.

Did you tell the jury about that Friday?

MR. LANE: Objection.

I don't think he's identified it yet, he hasn't seen the article. I don't know if you quoted it correctly.

BY MR. NISSEN:

Q. New York Times, May 17th, 1955.

Do you remember that one?

A. If it is in the New York Times and if it is about cigarettes and lung cancer, I saw it.

Q. Okay. Let me direct your attention to June 7th, 1955, it's a statement by Timothy Hartner, following a press release from the Tobacco Institute, New York Times, June 7th, '55, Hartner called the poll of doctors biased, non-scientific, and filled with shortcomings. Hartner called the report on the lung cancer study sweeping generalizations based on a survey that has been criticized by scientists for its limitations and inadequacies. Hartner added the American public should not be misled by sweeping generalizations

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

based on a survey that has been criticized by scientists for its limitations and inadequacies.

MR. LANE: Objection, your Honor. Can I be heard at the side bar?

THE COURT: Yes.

(Side bar conference.)

MR. LANE: It may be a minor note, and I don't know if you read it accurately. Our information is what you called the Tobacco Institute, which you referenced there, wasn't formed until 1958 or thereafter, Hartner may be with the TIRC, it is a historical difference.

Does the article say Tobacco Institute? You've read Tobacco Institute. If you've got an article that says so, then fine.

MR. NISSEN: Tobacco Industry Research Committee.

MR. SHEFFLER: There's a difference there.

THE COURT: You have to get it fixed in your mind.

MR. NISSEN: All right. Thank you.

THE COURT: Anything else?

MR. LANE: No. They don't know the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

difference. I think the record ought to be straight.

(End of side bar conference.)

BY MR. NISSEN:

Q. Were you aware that press releases were sent out with regularity by the Tobacco Industry Research Committee?

MR. LANE: Objection.

THE COURT: Overruled.

A. I would imagine they did. It's a common practice for groups of all kinds to do that.

BY MR. NISSEN:

Q. June 6th, 1955, press release.

MR. LANE: Objection, your Honor.

MR. NISSEN: We'll follow with the article, your Honor.

MR. LANE: I haven't got any identification of this document that you have in your hand.

BY MR. NISSEN:

Q. Did you ever see any of the press releases from the Tobacco --

A. No. I was studying the mass circulation media. Press releases are private things that are

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

distributed around. I have no knowledge of them.

Q. Well, would it be of any concern to you or relevance in terms of your analysis of the information available to the public to know that the tobacco industry through the Tobacco Industry Research Committee was sending press releases which were then followed in the press?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. Well, you stipulated, as I understand your question, that press releases from the Tobacco Industry Research Committee were followed in the press, but I read the press.

THE COURT: The question is would it affect your opinion.

THE WITNESS: Would it affect my opinion if the news media reflected some opinions?

THE COURT: Reflected press releases.

THE WITNESS: My opinion was that there was vigorous controversy not settled with many positions moving through the decade, and it had nothing to do with how the press generated that opinion. I don't have any knowledge of how the press generated that opinion. They reported papers

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library
http://www.industrydocuments.ucsf.edu/docs/sxxl0001

and opinions.

BY MR. NISSEN:

Q. New York Times, March 7th, '56. Doctor Robert Hawkette, scientific director of the Tobacco Industry Research Committee, says that smoking has been accused of all sorts of things.

Do you remember seeing that?

A. You know, I remember that, because it's the first and I think the only time in these fifteen years that I ever heard another person from the TIRC, this person Hawkette, I don't think I ever saw him again, he makes this one comment, which is very much like Doctor Little, but then he disappeared.

Q. Let's go back to Doctor Little in August 2nd, 1956. He's now talking about a research program developed by the Scientific Advisory Board of the Tobacco Industry Research Committee.

It says in 1956, "clearly any attempt to evaluate at this time the results of existing research projects would be extremely premature."

Do you remember that from the New York Times?

A. I'm sure I do. You found him saying again -- notice, Mr. Nissen, that this is not a

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the industrydocuments.ucsf.edu/docs/sxxl0001

contribution to which anyone needs to respond. It doesn't move the debate. It's just a comment that we've still got to do research.

Q. Nineteen fifty-seven, May, Scientific Advisory Board of the Tobacco Industry Research Committee. In response to an American Cancer Society report, said, quote, in advising and educating the public we believe the scientists should be cautious today in accepting a claim that a cause has been found for cancer, as they have found it wise to be in the past in accepting a claim for cure of cancer.

Again the industry calling for --

A. You said that was the Tobacco Industry Research Committee?

Q. Scientific Advisory Board.

A. The Scientific Advisory Board, if I understand it, is a group of scientists from all around the country, universities and other places, and they are the advisory board that helps the committee dispense the funds.

And what was your question about that?

Q. Do you remember that article?

A. I believe I remember. You have once again

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

demonstrated that that comment that they keep making in various different ways in an inert element of the debate. It's a comment they occasionally make. I think you found seven or eight.

Q. Well, wasn't that the kind of comment that would reassure smokers, this is from the tobacco industry published in the media, won't that type of comment reassure smokers?

MR. LANE: Objection.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Wouldn't that kind of comment be relevant in terms of the information available to a smoker whether to continue smoking or not to continue smoking?

MR. LANE: Objection.

THE COURT: Well, I think we're getting outside of his professed competence.

MR. NISSEN: Your Honor, I can rephrase it.

BY MR. NISSEN:

Q. Would this be another piece of information that you as a historian would consider a factor in the information environment?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Guidezer07a00.pdf www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Yes. As I presented in my carefully selected group of examples, several scientists, and when a scientist speaks, an independent scientist, I give that greater weight, because I believe that it has greater weight in the discussion. Scientists repeatedly said it's premature to decide on one factor on the basis of our scientific knowledge. Yes, that's an important theme.

Q. Wasn't it the Tobacco Industry Research Committee and the Scientific Advisory Board and other representatives of the tobacco industry who were consistently the ones who were saying there's no cause, there's no link between cigarettes and cancer? Wasn't it they who constantly said that all through the articles that you found in the fifties and the early sixties, is that correct?

A. What I regard as interesting and impressive is the degree to which scientists responding to each other said that. And that thing that the scientists said to each other as they went forward with their studies was picked up and was a comment occasionally made by the head of the Tobacco Industry Research Committee, and on that one occasion by their advisory board, which is a group of scientists. You

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

said a spokesman for the industry. It is not my understanding that they were what you'd characterize as spokesmen for the industry. These are scientists of universities.

Q. They were on the payroll of the Tobacco Industry Research Committee, isn't that correct?

A. I don't know how they were paid. I'm sure they were compensated.

Q. Didn't you find in your research that every time there was a study, whether it be by the National Cancer Institute or any other major organization saying that we find there's a link, a cause between cigarettes and lung cancer, that somebody, whether it was Doctor Little or Mr. Hartner, came out with a statement disputing it? Didn't you find that in your research, Mr. Graham?

MR. LANE: Objection.

A. No.

BY MR. NISSEN:

Q. You didn't find it?

A. No, I didn't. I was surprised.

Q. Let me direct your attention to July 13th, 1957, again Doctor Little in the New York Times, questioning the official position taken by the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

Public Health Service, challenging it, and Doctor Little says "three years of research by the Tobacco Industry Research Committee has produced no evidence that cigarette smoking or other tobacco use contributes to the origin of lung cancer."

Isn't that somebody from the Tobacco Industry Research Committee disputing findings of other independent scientists that there's a cause and effect?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. As with the other examples you cited, that is what he kept saying, and you can lift out and distort the size and the importance of that.

In my judgment, and I have read the thousands, I don't know if you have, in my judgment when you come down to a brief presentation to the Court, I included these in the materials in the proportion in which I thought they deserved to be included. It was a minor note, and I made it a minor note in my discussions. I let the scientists speak, because they were carrying the debate.

BY MR. NISSEN:

Q. They were carrying the debate, but everyone

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

on the behalf of the tobacco industry every time there was a credible study contested it?

A. That is not true. Based on my research it is suprising to me, I may have gone into this expecting something like that, it was suprising to me how minor their role was, how infrequently they were quoted and they spoke.

He's found nine or ten, he could find more. In the perspective of my research, I found they were a minor note, they were there, they said the same thing, they did not drive the debate.

Q. It's your opinion that that was minor to the public in terms of the information out there, is that your testimony?

MR. LANE: Objection.

THE COURT: Do I hear an objection?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. The note that the science is inconclusive is important. Doctor Little is right that that's important. He said it nine or ten times over a fifteen year period.

But in the thousands of things that I looked at, important scientists whose credibility

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

couldn't be questioned, and the reader would see that this is a scientist from the Mayo Clinic or from Johns Hopkins University, that had weight, and they were saying that note and I included that note, that's vitally important. I hope that I gave it the weight in my presentation that it deserved, that scientists said we don't know yet, we need more research. That's an important theme.

BY MR. NISSEN:

Q. Wasn't it important to the public to know what the industry was saying in the media?

A. Well, you're asking me to make a judgment about what's important to the public, and I don't know that I --

Q. Wasn't that your job in this case as a historian to pick out those articles that you felt in your judgment, Mr. Graham, were those which reflected the information environment in the fifties?

A. I thought your question was did I think something was important for the public to hear, and I don't think I make that judgment. If your question was was it important in the debate as I followed it, if that was your question, I would give

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

a different answer, because that is my responsibility to determine what is important in the debate as it moves.

What's important for the public to hear seems to be another question.

Q. What was important to you in picking out these articles that you brought before the jury?

A. Whether as I came to understand the debate the science was significant and was treated as significantly bearing upon the causal link or the question of a causal link, whether the evidence was convincing, what the problems with it were.

That was the nature of the back and forth as we went through the decade, and I've tried to bring that back and forth story to you.

Q. Wasn't that Doctor Ludmerer's job in terms of the medical articles and scientific debate, or is that now your job?

MR. LANE: Objection.

I don't think he can speak to what Doctor Ludmerer's job was.

THE COURT: I will sustain the objection.

BY MR. NISSEN:

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Mr. Graham, did you see the New York Times of November 15th, 1957?

By the way, have you heard of a gentleman named H.R. Hamner who was research director for the American Tobacco Company?

A. I don't believe I've heard of the gentleman.

Q. November 15th, 1957, Doctor Hamner studied the smoking habits and mortality of American Tobacco Company employees and in the New York Times denied that smoking has anything to do with cancer, and stated that the existence of such a population is that study makes it evident that cigarette smoking per se is not necessarily or invariably associated with a higher risk of lung cancer or diminished longevity.

Would it be important to know what the director of research and development for this Defendant was saying in the popular press?

MR. LANE: Objection.

I don't know what the title was of the article.

MR. NISSEN: I'm sorry?

MR. LANE: I don't know if the title

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

was read on the article.

MR. NISSEN: Cigarette Links To Cancer Denied.

MR. LANE: I mean the exact title of Mr. Hamner, that's all.

BY MR. NISSEN:

Q. Do you remember that article?

A. I can ask you to show it to me, but if it is from the New York Times I'm quite sure that you read it accurately and I'm quite sure I saw it.

Q. My question is; did you read it, if you remember?

A. If you want me to be absolutely sure, I better look at it. But I'm willing to state that if it was in the New York Times and if it was on this subject, I undoubtedly read it, and it sounded familiar.

What was the question?

Q. Was that a minor comment in terms of the informational environment available to the public at the time? Can you tell us yes or no?

A. Yes, I can respond to that yes or no.

Q. Which is it?

A. It is yes.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

What I found was that the tobacco industry spokesmen were -- there could not have been, in a set of news stories of the thousand newspapers that I looked at, there could not have been five, six, seven times when someone identified as an executive for a company had something to say, and it was interesting to me that what I found. I expected to found more. When I found these five or six little times, you found two of them I think, they were always at the bottom of the story, they were identified as who they were, so the reader could say this is a tobacco industry executive and their comment did not move the debate. It was that this is not proven, this is not proven. I regarded that as interesting and important. If I had had time I would have told you, but it was a minor theme.

When I came down to the major themes, I had to make the judgment that it was a minor theme, and that scientists had said the same thing in better and more impressive ways, so I brought those to you. I brought the same information, but in different spokesmen.

Q. I see.

Did you read to the jury the headline July

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

6th, 1958 in the New York Times of an article that said Tobacco Industry Scoffs At Survey? Would that be something important to the public in the popular press?

A. If you could communicate every snippet that occurred, that should be sent forward.

Q. Isn't that of some importance?

A. It's of some importance, but not sufficient importance to muscle aside. If I'd chosen that or any of the others, I would have had to drop something precious out of here.

This was hard for me to come down with 35. I wanted to bring in 100, and I was told that the Court's time and the Court's patience wouldn't allow me to bring in 100 or 200, so down we came to what I regarded as the core. And those predictable things that the industry said in my judgment didn't fit the core. This is a scientific, medical discussion.

Q. Mr. Graham, are you a scientist or a doctor?

A. No. I'm a doctor. Well, I'm a Ph.D doctor.

Q. Timothy Hartman, chairman of the Research

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

Committee, this was July 5th, '68, says tobacco industry scoffs at survey.

Timothy Hartner again, July 7th, just one day later, challenged a report of Doctor Harold Dorn, and Hartner says that the conclusions were unsupported by clinical and experimental evidence.

Was that another factor that would have been of importance to the consuming public?

A. I thought you read it once and it fits in.

Q. Two consecutive days?

A. If you didn't read it twice, if it's two separate times that he said that same thing I would respond in the same way that I responded to the other one in which he said the same thing.

Q. How about the fact that within one month, Mr. Hartner, the president of this group, was quoted three times in the New York Times?

I direct your attention to July 28th, '59 where Mr. Hartner denies a statistical link between smoking and cancer and says our position is a simple one. Statistics even when repeatedly publicized do not show that smoking causes cancer. We shall continue to speak up when there's a danger that the public will be misled, and his position about being

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

misled is that cigarettes don't cause lung cancer.

Isn't that correct, Mr. Graham?

MR. LANE: Objection.

Is that what the article says? Is that your question? Objection.

MR. NISSEN: I'm asking Mr. Graham if that's the obvious conclusion of these three articles within one month in the New York Times.

MR. LANE: Objection.

THE COURT: Overruled.

A. My judgment on his efforts to be a major player in this debate is that it must have frustrated him that he was not a major player in this debate, he did not have major news, he had the same piece of news, he had the same comment, he made it. I'd have brought that to the group if I had endless time. He could not become a major player. It must have frustrated him.

BY MR. NISSEN:

Q. He kept trying, didn't he?

A. It's my impression that he did.

Q. Now, how about the headline, May 17th, '55, Smoke/Cancer Tie Termed Obscure?

A. That's one I'd like to see. You said

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

"headline," and I'd like to see it.

Q. Headline of the article.

A. The heading.

Q. Yes. Heading.

A. It wasn't headline news.

Q. No. Heading of the article, though, in bold print.

A. Yes. It's the same minor note, and I see it there. It is in this case rather prominent at the top of the table, at the top of the column, you're right. Clarence Cooke Little was usually tagged on at the bottom.

This story is basically about $500,000 in research support that was allocated.

Q. The headline of this article, Tobacco Industry Upset By Link To Cancer - Starts Own Research. Is that the heading of that article?

A. Well, you're right.

Q. I'm asking, if you could for the moment, you'll have a chance to go into great detail I'm sure, is that the heading of that article?

A. That is the heading of the article.

Q. Okay. Mr. Graham, October of '59, James Richards, the president of the Tobacco Institute,

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

challenged an American Public Health Association resolution which suggested that excessive cigarette smoking is a major factor in disease.

Now, this is James Richards of the Tobacco Institute who in that article said the resolution, obviously the result of another effort by anti-smoking groups to get other backing for its anti-tobacco campaign.

Did you read that article, if you recall? Yes or no.

MR. LANE: Can we have the date again?

MR. NISSEN: October 23rd, '59.

A. That is in the New York Times?

BY MR. NISSEN:

Q. Yes, sir.

Do you recall it? That's my question.

A. I would ask to see it, but it sounds very much like I have read it, and you have selected again an interesting case where the news story -- most of these news stories made about three points, some of them made six and seven, but they made more than one. This one made a statement about the American Cancer Society had decided to issue a

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by: www.industrydocuments.ucsf.edu/docs/sxxl0001

warning, that's the big news. I selected that. In my judgment that's the big news to the reader. The reader looks at the story, American Cancer Society cautions about cigarettes, down in the story there are two or three other players dying to get in there and say something. If they are saying something predictable they'd been saying all along, I had to drop something out. I gave you the nugget of the story.

Q. What you dropped out is each and every statement by the tobacco industry, you didn't read one of them to the jury on Friday, did you? Yes or no. You didn't read one of them?

A. I don't believe I read one of them.

Q. Now --

A. I don't know how many things I read, four or five.

Q. December 5th, 1959, Robert Hawkette of Tobacco Research Committee challanged Doctor Oscar Auerbach's tissue studies.

By the way, were you aware that Doctor Auerbach was considered an expert by the Defendant's expert, Doctor McHugh?

MR. LANE: Objection.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. I don't know anything about that.

BY MR. NISSEN:

Q. Mr. Hawkette of the Tobacco, if I can read it right, Research Committee in this New York Times article indicated that Auerbach's observations first publicized in '56 have not been since accepted by many other pathologists.

Isn't this again a tobacco representative disputing well recognized scientists?

A. Mr. Nissen, you and I could consistently disagree about which is the important part of the article. The important part is the Auerbach studies, and I brought my studies forward.

Q. Let me ask you this.

Is it your testimony that it's not important that tobacco representatives are disputing each and every study by well recognized medical authorities such as Doctor Auerbach? Is that of no importance? Can you answer that yes or no?

A. That would be important if it were true, but it is not true that they rebutted every one. They didn't rebut even half. They didn't get a chance. That I found, and I was surprised to find that only ten or fifteen percent of the time they

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

got to say anything, and they always said the same thing, which wasn't really a rebuttal. To rebut is to say it's wrong.

They generally said Doctor Clarence Cook Little and tobacco research people said we need more research. They didn't say it's scientifically wrong.

Q. They called it loose talk disagreement, didn't they?

A. I remember that phrase.

Q. Arthur Godfrey called it applesauce. Are you aware of that?

MR. LANE: Objection.

THE COURT: Sustained.

BY MR. NISSEN:

Q. All through the fifties, and I'll direct your attention to just a few more, December 6th, '59, Doctor Little again, with respect to Doctor Bernie's article, the then Surgeon General of the United States, Doctor Little said scientific evidence is accumulating that conflicts with or fails to support the tobacco -- that tobacco smoking causes lung cancer.

Isn't this again a statement by a member

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

of the tobacco Scientific Advisory Board that there's no causation? Can you answer me yes or no?

A. It's an excellent example of an article in which I think the news is the Surgeon General of the United States cautioning the public against tobacco smoking, and you think the news is this repeated minor thing. I think I'm right about that, Surgeon General Bernie is the news here.

THE COURT: What's the heading of the article, please?

MR. NISSEN: Controversy In Lung Clears Up Again Over The Statistics, Industry Replies is the next under which Doctor Little comments.

BY MR. NISSEN:

Q. November 10th, '61, Doctor Little gave a speech that was referred to in the New York Times and said no one knows what part, if any, smoking plays in causing lung cancer, but new evidence tends to throw doubt on rather than support the charge against smoking as a major causative factor.

Now, here's another, I don't know what number it is, eighth, ninth, tenth reference to the New York Times alone by Doctor Little.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Would you agree with that?

A. I don't know about the number, but I would agree that's him again. Sounds like it is.

Q. Did you ever hear of Robert Hyman, former Chairman of the Board of the American Tobacco Company?

A. I'm not sure that I know that name.

Q. Mr. Hyman was quoted, referred to in the New York Times, March 5th, '62, and the author of the report which alleged that 11,000 factory employees at American Tobacco Company who smoked more than average had a lower death rate from cancer than the general population. Hyman reported that his findings were contradictory to the hypothesis that cigarette smoking per se is causally related to increased mortally interest from all causes, from respiratory tract cancer or from heart disease.

Did you read that article?

MR. LANE: Can I have the date on that, please?

A. I believe I remember that. Mr. Hyman was trying to become a major player and he reported some research. As I recall, about a week later it was called into question and dropped out. It was

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

another effort to get in this big game, and didn't seem to succeed. It's not a major research report, and it seemed to be flawed, as I recall that particular event.

BY MR. NISSEN:

Q. The heading of this article in New York Times was Study, Contradicts Smoking Death Line.

A. Yes. It was a week or two later when certain problems with that study started to come out, and I would think that it probably embarrassed him, but it was a minor episode, not a major episode.

MR. LANE: Can I have the date on it?

MR. NISSEN: The date? March 5th, '62.

BY MR. NISSEN:

Q. He was Chairman of the Board of the American Tobacco Company, wasn't he?

A. I don't know.

MR. LANE: Objection, your Honor.

BY MR. NISSEN:

Q. Did you see his videotape played to the jury?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by: www.industrydocuments.ucsf.edu/docs/sxxl0001

A. I saw -- whose videotape?

Q. Mr. Hyman.

A. I saw no videotapes, except the videotape, excuse me, of Edward R. Murrow's documentary. I saw no videotapes with anyone connected with this trial, if he was connected.

Q. In April 19th, 1963, the tobacco industry in a New York Times article made a strong plea for scientists not to accept as conclusive reports that cigarette smoke caused cancer.

Doctor Little, now we're into 1963, he's been writing articles, I believe, for now seven or eight years, reported or quoted in the New York Times, that is for a number of years, April of '63 Doctor Little was quoted as saying it is at present scientifically unwise and indeed may be harmful to attribute a simple definitive causative role to any one constitutional or environmental factor or to attempt to assign some degree of importance.

Do you remember that article?

A. Is that the New York Times?

Q. Yes.

A. If it's the New York Times and if it has to do with this subject, then I read it, and it sounds

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

to me by your account he's making it about once a year with that note that he always says.

Q. October of '63, in the New York Times, October 3rd, Doctor Jacob Cohen and Mr. Robert Hyman, challenged that cigarette smoking is statistically associated with death from lung cancer. In that article Doctor Cohen and Mr. Hyman pointed out that the effects of urban living, nervous tension, social stress, heightened metabolic activity, restless personality and accelerated rate of living were factors in lung cancer, and the heading of that article is to the Chairman of the Board of American Tobacco Company and this Doctor Cohen, the two doubt smoking is cancer caused, this is October 3rd of 1963.

MR. LANE: What paper?

MR. NISSEN: New York Times.

MR. LANE: What's the question?

BY MR. NISSEN:

Q. Well, would this have been of significance in terms of your search for that information which you considered in your judgment to be important to the public?

A. Not sufficiently, not sufficiently. There

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

is an industry executive identified as such trying to become a major player in a scientific medical controversy, and in my judgment he didn't make himself a major player, though I'm sure he was trying to.

Q. Did you know that Mr. Hyman said he knew more than the Surgeon General?

MR. LANE: Objection.

THE COURT: What's the question?

A. I didn't know that. I didn't know he said that. That would discredit him a bit, and I think his stock, whatever it was, would drop a little lower after that.

BY MR. NISSEN:

Q. We're into 1965, January, George Allen, then the president of the Tobacco Institute, at this time denied that cigarettes are a health hazard as he commented on the January 11th meeting on smoking and health. He said that no scientific offer of new scientific data was produced.

Do you recall that article?

MR. LANE: I object.

There's no foundation whether he read it. It appears to be beyond the period from which he

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

testified.

THE COURT: Let's get the time and place of this.

MR. NISSEN: The time, your Honor, was January 13th, 1965 in the New York Times.

THE COURT: Did you carry your research through that date, Doctor?

THE WITNESS: I did carry it through.

THE COURT: Do you recall this article?

THE WITNESS: I believe I do, sir, recall that article.

You notice that he's identified by the reporter as Tobacco Institute. It would be my judgment that an American reader seeing that a doctor is from the Mayo Clinic would weigh that in one way, and that when a Tobacco Institute official says something that is expected he would say, no surprise to it, I didn't think that had the weight to get into the story. It has some weight, but it doesn't have the sort of weight that an independent scientist would have. That was my judgment. I don't think I was wrong about that.

BY MR. NISSEN:

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. April 14th, 1965, New York Times. The heading of the article, Cigarette Study Draws Rebuttal, US data again challenged by Philip Morris.

Do you remember that one?

A. That's the spring of '65?

Q. Yes.

A. I don't specifically remember it. I'm sure they were doing the best they could to say something in the wake of the 1964 Surgeon General's Report. This is several months later.

Q. Mr. Graham, you've been talking about articles in various newspapers, magazines today and you did Friday, correct?

A. Yes.

Q. Would you agree that part of the information environment in the fifties and sixties included the advertising and promotion of the American Tobacco Company and other cigarette manufacturers?

A. I don't know what information environment is, but if you mean the total information supply, information of any kind?

Q. Available to the public?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Available to the public. A lot of things qualify for that. I guess that qualifies with a lot of other things.

Q. What else qualifies?

A. Well, I was more interested in high quality news reporting of serious talk, that's not paid ads, that's something the reader in my judgment would be very -- ought to be very interested in.

Q. You pointed to no article or blow-up of an article and referred to it specifically with respect to criticism by representatives of the tobacco industry on Friday?

A. I presented -- we presented no blow-up of such an article, if that was your question. I think that's right.

Q. And you pointed to no blow-up of any advertising by American Tobacco Company on Friday, did you?

A. Well, that would have been outside. Advertising was not a part of my research. My research was what was news media and public discussion. Advertising is in a different channel. It runs in a different channel than the channel I was examining.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Were you asked to provide research as a historian into the information environment with respect to tobacco smoking and health?

Let me strike that.

When Mr. Lane asked you did you check out the Boston Globe and the Surgeon General's Report, you answered my search method was to look at everything that had to do with smoking, cigarette smoking, lung cancer and health.

Now, was that your --

A. That's the context there I don't see. Probably I hope above that I had indicated that what I mean by everything is everything in the news media, the main channels of national discussion of news. I hope that I said that, because that's what I intended to say.

Q. Weren't ads in the media also?

A. Ads are in the media, but they were not in the news channels of discussion of news, that's in one part of the paper. The magazine ads are paid ads, anybody can see them over to the side, and they are doing their own thing over there. I was interested in the channel of serious discussion in prose.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Are you familiar with the Frank Statement To Cigarette Smokers?

A. Yes.

Q. And are you aware that that was published in some 500 magazines and newspapers across the nation?

A. I thought that I'd seen repeatedly that it was published in 275 newspapers. It would be my understanding it was broadly published in newspapers.

Q. In magazines as well?

A. I frankly never -- I don't think I saw that it was published in magazines, and I did not see it in magazines. I saw it in several newspapers. It was in both the Boston newspapers.

Q. Did you come across the Frank Statement in your own search?

A. Yes, I did. One comes across it. It's a full page ad.

Q. And in that ad the Tobacco Institute which, by the way, was founded by Mr. Hahn, a lawyer from Chadbourne & Parke --

MR. LANE: Same objection, your Honor, I think, as to the attribution.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: Yes. That doesn't appear to be in evidence at this point.

MR. LANE: I think also it's not the Tobacco Institute, your Honor. As we discussed before, it's a different organization.

THE COURT: Whatever. I will sustain the objection.

BY MR. NISSEN:

Q. The Tobacco Industry Research Committee. Did you see in that Frank Statement the statement by the industry that "we believe the products we make are not injurious to health"?

A. I'd like to refresh my memory, though. It won't take but a moment.

MR. NISSEN: Your Honor, may I?

THE COURT: Sure.

(Pause.)

A. All right. These look to be the same. This is from the New York Times, January the 4th, that's certainly it.

What part were you directing my attention to?

BY MR. NISSEN:

Q. "We believe the products we make are not

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

injurious to health."

A. Where is that?

Q. (Indicating).

A. Yes, I see that.

Q. You're aware, Mr. Graham, that this appeared in the Boston Herald and the Boston Globe as well?

A. It did.

Q. And at the bottom of the statement it indicates "this statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it"?

A. That's what it says.

Q. Correct?

A. Yes.

Q. Over the fourteen years that you reviewed, information in each and every instance of quotes from the industry they disputed the cause between cigarettes and lung cancer, correct?

A. If your question is when I saw statements by the industry they disputed the link, you're right. I can't think of a single statement in which they confirmed the link. They disputed the link

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the industrydocuments.ucsf.edu/docs/sxxl0001

when they spoke; they, among others.

Q. And at no time did the industry through your search admit that there was a link between lung cancer and cigarettes?

A. Not that I saw. Not during this period.

Q. Do you know Mr. Preston Leake, the vice-president and director of research and development of American Tobacco Company?

MR. LANE: Objection.

THE COURT: He can be asked if he knows him.

Do you know him?

THE WITNESS: Last night I met the gentleman in the hallway, it's a very narrow hallway, and he introduced himself. I've never met him before.

BY MR. NISSEN:

Q. What hallway?

A. In the hallway where I was working with the lawyers unpacking my boxes, and the hallway there, and here's this tall gentleman.

Q. He's here in court this morning?

A. I don't know. I only met him briefly, and I might not even recognize him.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. What hallway? Where?

MR. LANE: Objection.

A. It was in a building nearby. I'm disoriented. It's very close to here, within a block.

BY MR. NISSEN:

Q. It was in a law firm, correct?

A. Yes, law offices.

Q. And Mr. Leake was there?

A. I met him in the hallway.

Q. And were you aware that Mr. Leake as of 1988 on behalf of American Tobacco Company testified that he still adopted the Frank Statement?

MR. LANE: Objection, your Honor.

MR. NISSEN: It's been read into evidence, your Honor.

THE COURT: It's beyond the scope of the examination of this witness.

MR. NISSEN: I'll move on, your Honor.

THE COURT: Do you contemplate much more cross examination?

MR. NISSEN: Moderate. I'm through most of it, your Honor, but it still could be

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

perhaps fifteen or twenty minutes or something in that range, perhaps longer.

THE COURT: Let's take the morning recess.

(Jury excused from courtroom.)

THE COURT: May I see counsel briefly?

(Side bar conference.)

THE COURT: We're getting into the area of excessive repetition here. I think I'll suggest you get on to something different.

MR. NISSEN: Sure.

THE COURT: Either the point is made or it will never be.

MR. NISSEN: Okay.

(Whereupon, a recess was taken from 11:00 to 11:20 o'clock a.m.)

THE COURT: You wanted to see me?

(Side bar conference.)

MR. INGE: Your Honor, if I took longer to think about what I want to say I might say myself that it was silly, but I have to speak now.

There's a person who's been speaking with Preston Leake right outside the courtroom door who

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

has been smoking a cigarette. And it's hard for me to imagine that that is just -- that given the nature of the case that doesn't have some point to it.

THE COURT: What am I supposed to do, forbid him to smoke or forbid Mr. Leake to speak to him?

MR. INGE: It's in very close proximity to where the jurors enter and exit, and I know they have a right to smoke, but it's tantalizingly close to the jurors.

I don't know if that's a statement of some kind there. Maybe I'm just thinking too much.

THE COURT: I think perhaps it's a fertile imagination.

MR. INGE: Perhaps, your Honor.

THE COURT: Even if what you say is so, I don't think I could prohibit it without some sort of conclusive thing. I mean if he was marching up and down wearing a plaque that says what cigarettes will do to your health, I think I might.

MR. BEZANSON: What are you talking about, by the way?

MR. INGE: Who?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. BEZANSON: No. What?

MR. INGE: I'm talking about that some apparent associate of Preston Leake is smoking in close proximity to the jurors' accessway into the courtroom, that's what I'm talking about. Whether or not that constitutes -- let me bring up one other point since I am here. It's something that's troubled me throughout the trial.

I've been continually hearing reactions, and I know they are natural things, but I hear snickering on the part of the defense counsel and they, of course, are seated closer to the jury, and we find it more than just irritating.

THE COURT: They shouldn't do that.

MR. NISSEN: I don't recall that I snickered.

MR. INGE: I'm not saying you're conscious of it.

THE COURT: You're a habitual snickerer, because I can see from here, so watch out for it.

Actually they hurt themselves more than you. Just be careful you don't do any snickering yourself.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. NISSEN: I try to remain as passive as possible.

MS. LUMSDEN: Can the record reflect who you're referring to has a habitual snickerer?

MR. NISSEN: Lest it be considered us, your Honor.

THE COURT: Mr. Sheffield.

MR. SHEFFLER: I apologize, your Honor, if I'm a habitual snickerer.

THE COURT: You're a very discrete snickerer, but snickerer it is.

Let's get on to something serious, or relatively serious.

(End of side bar conference.)

THE COURT: Are the jurors here?

(Jurors present at 11:25 o'clock a.m.)

THE COURT: All right. Let's get started again.

MR. NISSEN: Shall I continue?

THE COURT: Please do.

MR. NISSEN: Thank you.

BY MR. NISSEN:

Q. Mr. Graham, you were brought to Federal Court to testify in the Kotler case in part to talk

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

about the trends and developments that contributed to the popularity of the cigarette, correct?

A. You mean --

Q. Let me rephrase it.

Did you ever see a statement summarizing your testimony provided by the attorneys for American Tobacco Company?

A. I've both seen it and heard it.

Q. You have both seen it and heard it?

A. Yes. I believe that I have seen it. It's my recollection I've seen it. I've certainly heard it read to me over the phone.

Q. In that statement it says in part, "Doctor Graham is expected to testify --"

MR. LANE: I object, your Honor.

Can we be heard at the side bar on this?

(Side bar conference.)

MR. LANE: What he's reading from is a statement prepared by all of defense counsel. It talks about Doctor Graham, and it is setting forth what at that time -- he's read it, I have no problem, but why should it be used against him? If the strategy changes --

THE COURT: We don't know what the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

question is.

MR. NISSEN: I think what's proper is for Mr. Graham --

THE COURT: He doesn't say he saw it. He said he's read it and heard it. At least he's heard it.

MR. NISSEN: Thank you.

(End of side bar conference.)

BY MR. NISSEN:

Q. Mr. Graham, my question to you now is; would you agree that contributing to the popularity of the cigarette over the years was in part the advertising by the manufacturers of the cigarettes?

MR. LANE: Objection.

THE COURT: Sustained.

That's beyond the scope of his direct examination.

MR. NISSEN: Well, your Honor, if I may try another question.

BY MR. NISSEN:

Q. You say that you did some analysis of the forties, correct, Mr. Graham?

A. Yes.

Q. Certainly some extensive examination of the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

fifties?

A. Yes.

Q. In performing that analysis in terms of the historical information environment regarding smoking and health, did you from time to time see any of the advertisements of the manufacturers?

MR. LANE: Objection.

THE COURT: Overruled.

A. I from time to time did.

BY MR. NISSEN:

Q. They, in fact, were on the same page as some of these articles you've been testifying about as well, correct?

A. Sometimes.

Q. In the same papers on the same pages?

A. Sometimes. Not usually, but sometimes.

Q. And would you agree that spokespeople on behalf of tobacco companies in the forties and fifties, for example such as Joe DiMaggio -- did you ever hear of Joe DiMaggio?

A. Yes.

MR. LANE: Objection to this line of questioning.

THE COURT: I haven't heard the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

question yet.

What's the question?

BY MR. NISSEN:

Q. My question is, first of all, have you heard of Joe DiMaggio?

THE COURT: His answer is yes.

BY MR. NISSEN:

Q. Do you have an opinion, Mr. Graham, whether or not Joe DiMaggio was a credible spokesman for the tobacco industry?

MR. LANE: Objection.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Do you have an opinion whether or not statements by Joe DiMaggio available in the magazines and newspapers that you've talked about was a factor in terms of the information environment available to the public?

MR. LANE: Objection.

THE COURT: Overruled.

Answer yes or no as to whether you have an opinion.

A. Is that the question, whether I have an opinion as to whether that was in the information

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

environment? Yes.

BY MR. NISSEN:

Q. All right. Did you see particular ads --

THE COURT: What's the next question? What is your opinion?

BY MR. NISSEN:

Q. What is your opinion?

MR. LANE: Objection.

THE COURT: Overruled.

A. If you mean by information environment the totality of all information, it is my opinion that that ad was a part of that totality.

BY MR. NISSEN:

Q. Well, I show you, if I may, these ads, Time Magazine, back of Time Magazine, 1940, Joe DiMaggio (handing).

A. Which one is Joe DiMaggio? I should recognize Joe DiMaggio. This is Joe DiMaggio, yes.

Q. I show you this ad referring to Joe DiMaggio.

A. That's Joe DiMaggio.

Q. In the ad Joe DiMaggio says "I've smoked Camel's for eight years. They have the mildness, that counts with me."

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. LANE: Objection, your Honor.

THE COURT: Sustained.

BY MR. NISSEN:

Q. I'd like to show you -- let me ask you, Mr. Graham, would this type of ad be a factor in the information environment? Do you have an opinion --

MR. LANE: Objection.

EY MR. NISSEN:

Q. -- with reference to people taking up and continuing smoking?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. As you -- as we have, I think, agreed to the definition, information environment is the totality of all scraps of information. I agree that that's in that so defined environment. Your question, would that influence be with respect to smoking, and I don't have an opinion about that.

BY MR. NISSEN:

Q. Did you see in your research of the forties ads which stated "more doctors smoke Camel's than any other cigarette"?

MR. LANE: Objection.

THE COURT: Sustained.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

BY MR. NISSEN:

Q. Did you see an ad for Camel's that talked about the T-scene in your research?

MR. LANE: Objection, your Honor.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Did you come across ads, Mr. Graham, in your search from stars such as Ed Sullivan, Ronald Reagan, Steve McQueen, did you come across any of those ads?

MR. LANE: Objection.

THE COURT: Overruled.

A. Not -- I don't remember any of those particular ones, but I saw ads.

THE COURT: End of the answer. Next question.

BY MR. NISSEN:

Q. Did you come across any ads from John Wayne?

MR. LANE: Objection.

THE COURT: Overruled.

A. I don't recall that much on --

THE COURT: Okay. Next question.

MR. NISSEN: May I approach the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

witness, your Honor?

THE COURT: Yes.

BY MR. NISSEN:

Q. I show you an ad with Ed Sullivan and ask you, Mr. Graham, if that refreshes your recollection.

MR. LANE: Objection.

THE COURT: He asked if it refreshes his recollection.

BY MR. NISSEN:

Q. If you saw that.

MR. LANE: Objection.

A. I don't believe I saw that.

BY MR. NISSEN:

Q. I show you an ad with Ronald Reagan.

Do you remember seeing that?

A. I did see that.

MR. LANE: Objection.

THE COURT: He says he saw that.

BY MR. NISSEN:

Q. In your research as to the trends in development that contributed to the popularity of the cigarette, did you look at in the fifties the television media as to what information was being

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

sent to the public on television?

MR. LANE: Objection.

THE COURT: Overruled.

A. No.

BY MR. NISSEN:

Q. You didn't.

Do you have an opinion, Mr. Graham, whether or not the television media was a media that was -- let me strike that.

Were you aware that Mr. Kotler watched television from time to time in the fifties?

MR. LANE: Objection.

THE COURT: Overruled.

A. No, I have no knowledge of Mr. Kotler.

BY MR. NISSEN:

Q. Do you know where Mr. Kotler was in 1951?

A. No.

Q. Do you know where he was in 1954?

A. No.

Q. By the way, did you read any of the testimony of Mr. Coveny?

A. No.

Q. Would it have been of any importance to you as a historian to know some of the family and

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

personal values of George Kotler's era growing up in terms of interpreting the information environment?

MR. LANE: Objection.

THE COURT: Overruled.

A. I don't know Mr. Kotler, but I think that any information that a historian can gain is potentially helpful.

BY MR. NISSEN:

Q. But you didn't read that deposition of Mr. Coveny?

A. No.

Q. Nor were you given it?

A. No.

Q. Did you read Mr. Kotler's sister's deposition?

A. No.

Q. Now, from your own knowledge, were you aware of a man named Arthur Godfrey?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. Yes.

BY MR. NISSEN:

Q. Could you tell the jury a little bit about Arthur Godfrey?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. LANE: Objection, your Honor.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Do you know from your own information whether or not Mr. Godfrey was a spokesman for Chesterfield during the fifties?

MR. LANE: Objection, your Honor.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Mr. Graham, did Arthur Godfrey contribute in terms of his appearance on television to the information environment available to the public?

MR. LANE: Objection, your Honor.

THE COURT: Well, I think we need a preliminary question, whether he paid any attention to whatever it was that he did. All we know is that this witness has heard of him, then you have a little more about what study he made of his activities.

BY MR. NISSEN:

Q. What information did you derive about Arthur Godfrey?

MR. LANE: Objection.

THE COURT: With respect to his

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

presentations?

MR. NISSEN: Yes, your Honor, with respect to his presentations as to any cigarette product.

MR. LANE: In this case?

THE COURT: At any point.

A. I encountered in my research some news stories about Arthur Godfrey in connection with lung cancer and smoking.

BY MR. NISSEN:

Q. All right. And were you aware that he made certain statements on television with respect to the safety or non-safety of smoking?

MR. LANE: Objection.

THE COURT: Sustained.

Wait a minute.

Yes, I'll sustain the objection.

BY MR. NISSEN:

Q. Did you form an opinion whether or not statements by popular TV personalities comprised part of the information environment to the public in the fifties?

MR. LANE: Objection, your Honor.

THE COURT: Sustained in view of his

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Supported by www.industrydocuments.ucsf.edu/docs/sxxl0001

prior answer.

MR. NISSEN: I'm sorry, your Honor?

THE COURT: I sustained the objection.

BY MR. NISSEN:

Q. Could you tell us about the stories you read about Arthur Godfrey?

MR. LANE: Objection.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Do you know whether or not there were any comments about risks of smoking in the articles you read with respect to Arthur Godfrey?

MR. LANE: Objection.

THE COURT: Sustain the objection.

BY MR. NISSEN:

Q. Mr. Graham, did you learn from your search that John Wayne and Arthur Godfrey and Ed Sullivan all died of lung cancer?

MR. LANE: Objection.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Mr. Graham, you testified, I believe, that it's significant to you that the AMA, that is the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

American Medical Association, what they were saying about smoking and health in the fifties and sixties, that would have been important to you?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. The AMA is an important national organization. That would have been important, yes.

BY MR. NISSEN:

Q. Were you aware prior to giving your opinion in court that the American Tobacco Company and other tobacco companies through the Tobacco Institute were making sizable contributions to the AMA?

MR. LANE: Objection.

THE COURT: Overruled.

Were you aware of that?

THE WITNESS: I believe in one or two stories I did see the stories saying that the AMA had received some research funds, but I don't have a clear memory of that occasion.

BY MR. NISSEN:

Q. Do you recall that it was ten million dollars?

A. I don't recall the number.

Q. Were you aware that in a memorandum from

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

the president to the Tobacco Institute in 1971 --

MR. LANE: Objection, your Honor.

THE COURT: Show it to him and see if he ever saw it before. Don't read it.

A. Did you say 1971?

BY MR. NISSEN:

Q. Yes.

Were you aware of any comments by the president of the Tobacco Institute with reference to the AMA?

A. No. That's outside the years or outside the area of my research.

Q. Okay. Were you aware, Mr. Graham, that the AMA owned substantial tobacco stock in their pension fund?

MR. LANE: Objection.

THE COURT: Sustained.

BY MR. NISSEN:

Q. Would it be important to you in terms of your search of the information environment to know that the American Medical Association not only received ten million dollars from tobacco companies but that they owned stock in the tobacco companies?

MR. LANE: Objection.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Downloaded from www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: Would it be important?

MR. NISSEN: Would it be important in his --

THE COURT: I'll see you at side bar.

(Side bar conference.)

MR. NISSEN: It's a question of insinuatic. There's no proof of the actual facts.

THE COURT: That's just the point that I waied to make. If you have some, if you want to cie in with some competent evidence on this --

MR. NISSEN: Okay.

THE COURT: -- then you can ask the question. You can't just let it hang out there. He's goin to say geez, I never heard about it.

MR. NISSEN: I understand, your Honor. H admitted he's aware of the contribution.

THE COURT: Yes.

MR. NISSEN: But the stock reference is from an author, a British author in a book called Smoke Rings.

THE COURT: You're not going to get that. So.

MR. NISSEN: All right.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: If you can't get the facts in you can't ask a question. That's quite improper. You should not do that.

MR. LANE: Furthermore, it's way beyond, it seems to me, his direct testimony.

THE COURT: I've ruled on that question. Let's see what the next one is.

(End of side bar conference.)

THE COURT: Objection is sustained.

BY MR. NISSEN:

Q. Mr. Graham, would it be important to you in terms of your assessment as to which of these articles you considered important and brought before the jury to know whether or not any of the doctors were receiving funds from Tobacco Institute or Tobacco Research Committee?

MR. LANE: Objection.

THE COURT: Overruled.

A. No, not particularly.

BY MR. NISSEN:

Q. Do you have an opinion as to what impact on the information environment was when the investigation by the AMA funded by the tobacco companies was being undertaken at the same time the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

Surgeon General's Report was being released?

MR. LANE: Objection.

THE COURT: I don't understand the question. I sustain the objection.

MR. NISSEN: I'll rephrase it, your Honor.

BY MR. NISSEN:

Q. Would it matter to you how much money a doctor received from the Tobacco Institute in terms of the importance of the opinions they arrived at and promulgated to the press?

MR. LANE: Objection.

THE COURT: Overruled.

A. It wouldn't be important to me unless it was reported in the news and became in some way a part of the weighting of the information that the public might reasonably make in their own judgment. If it was in the story it might be important in the context.

BY MR. NISSEN:

Q. It's only important if it's in the story, it's unimportant to you how much money the doctor was being given by the tobacco company?

MR. LANE: Objection.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: If any.

It's immaterial, Doctor, not part of your examination?

THE WITNESS: That's correct.

THE COURT: All right.

BY MR. NISSEN:

Q. Well, were you aware that the ten million dollars pledged to the American Medical Association was done in around the time the Surgeon General's Report of '64 was about to be published?

MR. LANE: Objection.

THE COURT: Overruled.

A. My memory of that story, that was one story or two, places it not in '64, but I don't have a clear memory of it. That could very well be so.

BY MR. NISSEN:

Q. And do you have an opinion as to what impact on the information environment there would be to the public learning that the AMA is starting its own study at about -- or about the same time the Surgeon General's Report of '64 comes out?

MR. LANE: Objection.

THE COURT: May I have the question?

MR. NISSEN: I may have fragmented it

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

a little.

THE COURT: Read it back.

(Whereupon, the reporter read back the pending question.)

THE COURT: That's a yes or no.

THE WITNESS: Do I have an opinion?

THE COURT: By that I mean yes period or no period.

THE WITNESS: Yes.

BY MR. NISSEN:

Q. What's your opinion?

MR. LANE: Objection.

THE COURT: Overruled.

A. My opinion is that the news -- if there were news, and there was news, I believe, that the AMA was going to conduct more research, that is a -- I'm sorry, I don't remember the question. That is a --

BY MR. NISSEN:

Q. Did it have an impact on the public hearing this information?

A. It would have had some impact. It was not news. That sort of news was coming out constantly, so it would have been an additional piece of

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

information, and further research was underway.

Q. Wouldn't you agree it would have the effect or create the impression that further study was needed?

MR. LANE: Objection.

THE COURT: Overruled.

A. The impression that further research was needed was made repeatedly and was a sustained theme, yes.

BY MR. NISSEN:

Q. Did you know, Mr. Graham, that that study commissioned by the Tobacco Research or Institute, the results of that were not published for fourteen years?

MR. LANE: Objection.

THE COURT: Well, now we're getting beyond the time of this witness' investigation. I don't know what other evidence there may be of that, but not through this witness.

I'll sustain the objection.

BY MR. NISSEN:

Q. Mr. Graham, did you ever learn when the results of this study commissioned at about the same time as the Surgeon General's Report was coming out

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

were made public?

MR. LANE: Objection, your Honor.

THE COURT: Overruled.

A. No.

BY MR. NISSEN:

Q. You referred to articles Friday in which certain doctors questioned the causal connection between cigarettes and cancer.

Doctor Paul Cotton was one, and Doctor William Reinhoff was one.

A. Yes.

Q. Did you know that both those doctors were on the payroll of the Tobacco Institute?

MR. LANE: Objection, your Honor.

May I be heard?

(Side bar conference.)

THE COURT: Do you have any evidence?

MR. NISSEN: Yes.

THE COURT: What's the evidence?

MR. NISSEN: The form of the evidence is the composition of the Scientific Advisory Board to the Tobacco Industry Research Committee in a statement. Tobacco Industry Research Committee, I'm

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

sorry.

MR. LANE: It makes a difference. The tobacco companies is outrageous. There's no foundation for it. The questions are inadequate and -- and evidence in this case, these are assumptions, it's misleading, it's inuendo.

THE COURT: Even if he had read about it it would be hearsay. All he can say is whether there was -- all he can say is whether there was any report of this in the press.

MR. NISSEN: Okay.

MR. SHEFFLER: He testified he didn't know --

THE COURT: I think you better stop this line.

MR. NISSEN: Your Honor, may I just make an offer of proof?

He said only four or five articles, Doctor Reinhoff said don't worry about it, go ahead and smoke.

THE COURT: The problem is that this was not introduced for the truth, only as to indicate what was abroad in the newspapers. Now you're trying to go to impeach the person who is

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

quoted in a newspaper, and it's not in for that purpose.

MR. INGE: Your Honor, if I may briefly reply, this witness has made judgments about which statements are the significant ones.

THE COURT: Sure. You can kick him around if you want to, in fact I think you have. I don't think you can get at it by putting in inadmissible evidence.

MR. BEZANSON: There's no foundation here.

THE COURT: In any case --

MR. LANE: That's a big point.

THE COURT: I think you better get off it.

MR. NISSEN: Can I ask him whether or not he was aware from his research that Doctor Reinhoff was on the Scientific Advisory Board?

THE COURT: If he saw anything in his research to say that, fine.

MR. NISSEN: Thank you, your Honor.

MR. LANE: What dates are you talking about?

MR. NISSEN: Nineteen fifty-seven,

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

May 1st.

THE COURT: You've got nothing in there that shows anything about payroll, if anybody gets paid or who gets paid.

MR. LANE: It's an advisory board.

THE COURT: You can ask him.

MS. LUMSDEN: He said about Doctor Little he assumes he was compensated, he already --

MR. LANE: He's director of the Scientific Advisory Committee.

THE COURT: I will let you have the question you referred to, but nothing much more.

MR. NISSEN: Thank you, Judge.

(End of side bar conference.)

BY MR. NISSEN:

Q. Mr. Graham, would it have been of importance to you to know anything more about the authors of articles that you selected from your judgment of all the thousands of articles, I think you yourself said, you read four or five, correct?

A. Four or five?

Q. To the jury, I'm sorry, on Friday.

A. If that's what I said.

Q. Would it be of importance to you in

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

arriving at these few articles that you read to the jury to know whether or not the authors of the articles were in any way related to or participated with the Scientific Advisory Board of the Tobacco Industry Research Committee?

MR. LANE: Objection.

THE COURT: Overruled.

A. The question is would it be important to me to know?

BY MR. NISSEN:

Q. Yes.

A. I like information, it would be important, but it wouldn't alter my opinion of what the public was perceiving in the media, unless the information you're telling me would in itself be in the media.

Q. Would it be important for the public to know about Doctor Reinhoff, for example, who is quoted as saying --

MR. LANE: Objection, your Honor.

BY MR. NISSEN:

Q. -- go ahead and smoke?

THE COURT: Do I hear an objection?

MR. LANE: Yes, I did object, your Honor.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: I don't always hear.

MR. LANE: I'm sorry, your Honor. I'm a little hoarse today.

THE COURT: If you rise I can get a clue.

MR. LANE: I do object.

THE COURT: The objection is sustained.

BY MR. NISSEN:

Q. Did you have any particular -- strike that. Did you check out any further those few selected authors or doctors who you read from to the jury? Did you research into their backgrounds at all to find out whether or not they were players, so to speak, from either side?

MR. LANE: Objection.

THE COURT: Overruled.

A. I did not do research into the individuals' personal lives, no.

BY MR. NISSEN:

Q. Have you ever seen a list of the Tobacco Industry Research Committee Scientific Advisory Board?

A. I believe I have.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. All right. And on that board was Doctor William Reinhoff, correct?

A. I believe that is my memory, that he was.

Q. Doctor Paul Cotton who you cited Friday was on it also?

A. I believe that, too, is true.

Q. And, of course, Clarence Cooke Little was the director?

A. Yes, sir.

Q. Were you aware, Mr. Graham, that the American Tobacco Company dropped the New York Times from its list of advertisers?

MR. LANE: Objection, your Honor. May I be heard at side bar?

THE COURT: No, you don't have to be.

Objection sustained.

BY MR. NISSEN:

Q. Would it have been of any importance to you in your assessment of the newspapers and the information environment as participated in by the Defendant, American Tobacco Company, if they dropped certain newspapers and magazines from the roles of those in which they advertised? Would that be of

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the industrydocuments.ucsf.edu/docs/sxxl0001

any significance to you, sir, in your opinion --

MR. LANE: Objection.

BY MR. NISSEN:

Q. -- about both sides of the issue here of the information environment?

MR. LANE: Objection.

THE COURT: Sustained.

MR. NISSEN: May I have a second, your Honor?

THE COURT: Yes.

(Pause.)

BY MR. NISSEN:

Q. Just a few more questions.

Do you know whether the members of the Scientific Advisory Board were compensated by the Tobacco Industry Research Committee?

MR. LANE: Objection, your Honor.

THE COURT: If he knows. You can have that. Overruled.

Do you know that?

THE WITNESS: I don't know that one way or the other. It was not -- I don't know that.

BY MR. NISSEN:

Q. Mr. Graham, do you have an opinion whether

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

or not the millions of dollars spent by the tobacco companies and American Tobacco Company on advertising in the newspapers and magazines had any impact on the information environment?

MR. LANE: Objection, your Honor.

THE COURT: We've already gone into that.

Sustained.

BY MR. NISSEN:

Q. Mr. Graham, did you know that American Tobacco Company dropped its advertising from Reader's Digest?

MR. LANE: Objection, your Honor.

THE COURT: Sustained.

MR. NISSEN: No further questions.

May we approach the bench?

THE COURT: Sure.

(Side bar conference.)

THE COURT: Okay. What do you want to do?

MR. NISSEN: We move to strike Mr. Graham's testimony.

THE COURT: Well, I've thought about it, but I think I'm going to let it stand and make

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

the jury think of it what they will. They've had a good chance to wack it around and make comment on it.

MR. NISSEN: May I also say if they intend to offer newspaper articles, we would ask that we then have a chance to offer in all the advertising.

THE COURT: I don't know what they are going to do. I'll take that up.

MR. NISSEN: Just so we don't waive any rights on that.

THE COURT: You don't waive any rights.

MR. NISSEN: Thank you.

(End of side bar conference.)

REDIRECT EXAMINATION

BY MR. LANE:

Q. Professor Graham, did you over the weekend at our request go to Santa Barbara and try to collect all the materials that you had assembled for preparation and as part of your research for this case?

A. Yes.

Q. And did you bring to Boston with you as

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

much as you could put together?

A. Yes.

Q. And there has been some discussion this morning in the cross examination by Mr. Nissen about the New York Times, you certainly recall that?

A. Yes.

Q. And would you tell us what you did or when you first made a request for copies of all the articles in the New York Times?

A. When I first made a request?

Q. Yes.

A. For --

Q. All the articles in the New York Times on the subject of cigarette smoking and lung cancer or coverage of a scientific and medical debate.

A. I would say it was at mid point in my research, which may have been at the end of the summer when the direction of my research changed and it was necessary for me to go into primary sources.

And, by the way, I didn't request the entire New York Times. At that time there was some chronological boundaries on my request.

Q. What was the request? What were the boundaries?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. It was at this time that you're referring to that it was decided that I would pursue a more intense study of the cigarette and lung cancer issue or what was called in the media the cancer scare. I knew enough to know from my research that that cancer scare dated from 1950 forward, at least to the Surgeon General's Report at least and on, so I determined that if that -- that now being the subject, I would request the New York Times from 1940 to get a bit of the background so I could go through the fifties and into the sixties with that source.

Q. Did you decide that's what you needed to do your research for your study in this case?

MR. NISSEN: Objection.

THE COURT: Overruled.

A. When the question became the lung cancer and cigarette issue, I determined that the first primary source I wanted to use was the New York Times.

BY MR. LANE:

Q. And as a result what steps were taken to get the New York Times?

A. Fifteen years of the New York Times is a

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

lot of newspaper, and I indicated that I could do it in my normal way going myself to the library, but it would be very time consuming.

And the suggestion was made that the services of a research firm could be secured, a historical research firm, and I agreed that that was an excellent idea, I knew of research firms, I knew there were historical research firms who could be hired to do that, and it would be an excellent way for me to get the database in my hands.

Q. At some time were you provided with articles from the New York Times?

A. Yes, I was provided with what I requested.

Q. Let me show you this bundle of materials and ask you whether you can identify it (handing).

A. It looks like my collection of the articles on the cancer, lung cancer and cigarette issue that appeared in the New York Times from 1940 to 1965.

Q. These came to you, is that correct?

A. They came to me.

Q. All right. And did you take any steps yourself to determine whether or not you had a complete set of the articles in the New York Times over the time period we're discussing?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Yes, I did.

Q. And how did you go about doing that?

A. I'd used a research firm before, I had no suspicions, I had confidence in the research firm, but it is prudent and responsible to check, and so I set up a rigorous system of determining the validity and the thoroughness of the research firm's results.

Q. What did you do?

A. I used graduate student research assistants and myself and we jointly working together, set up a system of checking systematically, we selected four months of every year, we went -- we took the results of the search, we went to -- the paper itself is on microfilm, to determine if these articles were, in fact, there where they said they were, and if we saw any others that weren't there.

When we found an article, an alleged article that supposedly appeared on this date, we put a sandwich around it, that is we researched one day before it and one day after it and that date to find out if it was there and if they had missed anything.

And we also checked the New York Times Index to see if they'd missed anything.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. What is the New York Times Index?

A. It's a very valuable research. Most newspapers are not indexed, but the New York Times has been indexed for a very long time, and you can use the index and pick a topic, cigarettes, lung cancer, earthquakes.

Q. How did you use the index to check on the completeness of your set?

A. I had my research assistants check on lung cancer, smoke and cancer to see if stories were missed, and if these stories were there.

In other words, we were systematically sampling. I couldn't go back and do this again. This is an enormous labor of work, but I sampled.

Q. As a result of the sampling you described in using the New York Times Index, did you make any determination as to whether or not any article was missing?

A. Yes.

Q. What did you find out?

A. They missed one.

Q. Over long a period of time?

A. The fourteen to fifteen year period, they missed one in 1957.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Do you have an opinion whether or not the set you have there represents, so far as you know, a complete set of the New York Times articles on cigarette smoking and lung cancer from 1940 to 1965?

MR. NISSEN: Objection.

THE COURT: Can I have the question back, please?

(Whereupon, the reporter read back the pending question.)

THE COURT: Overruled.

BY MR. LANE:

Q. You may answer.

A. Yes. I have confidence that it is. I've now supplied that one article.

Q. And Mr. Nissen in his questions to you today pointed out to you or put in front of you certain articles wherein certain members of the TIRC, Tobacco Industry Research Committee, or tobacco executive or some other person in some way related to the tobacco industry was quoted in an article in the New York Times, is that correct?

A. That Mr. Nissen did that?

Q. Yes.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Yes.

Q. And from your examination of the New York Times articles that you have there, can you tell us based upon your examination and review of those articles with what frequency, if any, such articles appeared containing statements by someone from the Tobacco Industry Research Council or Doctor Little or any other person that's been mentioned?

A. Yes. I believe I said earlier it would be my judgment that about ten or fifteen percent of the time such statements were attached usually to the bottom of an article.

Q. And in the articles you showed the jury, do you recall whether the names Huper -- do you recall the name of Huper?

A. Yes, I do.

Q. Or the name of Cameron?

A. Yes.

Q. Or Heller?

A. Yes.

MR. NISSEN: Objection, your Honor.

THE COURT: Overruled.

MR. NISSEN: Leading.

THE COURT: Overruled.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by: www.industrydocuments.ucsf.edu/docs/sxxl0001

BY MR. LANE:

Q. Surgeon General Bernie?

A. Yes.

Q. Those are articles you showed this jury last Friday, is that correct?

A. Yes.

Q. Did you have any information that any of those persons in any way directly or indirectly were receiving benefits or any other kind of compensation from anyone connected with the tobacco industry?

A. I have no information.

Q. In addition to your work in the New York Times, did you request any other materials in order to conduct your research into this matter?

A. Yes.

Q. What did you request?

A. I indicated that if I were to do a search of the media and the channels of news that I would want to select a major, large circulation, influential journals, magazines and carefully read through.

Q. Did you pick the magazines to be researched?

A. I picked Time and Newsweek. They were the

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

central magazines of news. I picked Reader's Digest, because it was the largest circulation journal in the country and was interested in this issue. I knew that. I picked Life Magazine for the same -- for similar reasons. And I picked Consumer Reports, though its circulation is no so large. It was an influential magazine on consumer issues and issues of this kind.

Q. Did anyone at any time place any limitation upon you as to what magazines could be selected for your review and research?

A. No, and I wouldn't have accepted any.

Q. Did you at some time -- could you tell us what you did, how did you get, for example, materials from Time Magazine?

A. I indicated that as I conducted this research that this was very arduous labor and took a long time. The suggestion was made that, as with the New York Times, perhaps a historical research firm could get the data and send it to me. And so an arrangement was worked out whereby the historical research firm would get all the articles on cigarette smoking and lung cancer from Time, Newsweek, and Consumer Reports, and that would be

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

sent to me, and I would myself use my graduate students to get the other two which were close by and readily accessible and in our library, that's Life Magazine and Reader's Digest.

Q. So at some time did you receive articles from Time Magazine or media coverage of Time Magazine appearing in Time Magazine?

A. I received a set of reports, news stories from Time Magazine on cigarettes and lung cancer.

Q. And did you make any attempts to validate the materials you received from Time Magazine with respect to Time Magazine as to their completeness?

A. Yes.

Q. And how did you do that?

A. In much the same way and for much the same reasons. I wanted to be sure, so my research assistants and I selected four months of every twelve, and went to the shelves in the library nearby and pulled down the volumes and read those volumes to be sure that the stories that I had received were there where they were supposed to be and that no other stories had been missed.

Q. You did this for four months of each year?

A. Yes. It's a sample. It's a controlled way

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

to get quickly to get confident in your materials quickly.

Q. I show you this compendium and ask whether you can identify that compendium.

A. This looks like my Time and Newsweek collection.

Q. Did you also receive a Newsweek as well as Time under the same methods you described?

A. Yes.

Q. And did you check and investigate those in the same way?

A. Yes.

Q. How about Consumers Reports, did you do those in the same fashion as you just described?

A. In the same way.

Q. The original volumes or the original excerpts were provided by the research group, if you will?

A. Yes.

Q. How did you validate those?

A. In the same way.

Q. Did you have occasion at any time to use the Reader's Guide to Periodical Literature for the validation process?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Yes. The Reader's Guide is a good index. You can look under cigarettes and lung cancer and see what stories appeared in major magazines, and my research assistants went through that to see that major stories had not been missed.

Q. You checked what you had against what was showing in the Reader's Guide?

A. Yes.

Q. For four months of the year as well?

A. Yes.

Q. I'm showing you this compendium. Are those the reports that you received with respect to the Consumer Reports Magazine (handing)?

A. Yes.

Q. You mentioned also Reader's Digest.

How was Reader's Digest done to obtain the articles from Reader's Digest?

A. Obtain the articles?

Q. Yes.

A. I obtained the articles that way by going to the Reader's Guide to the index and going to the library and taking them and Xeroxing them.

Q. You did this in California?

A. In California.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Did you obtain a set of Reader's Digest articles on the subject?

A. Yes.

Q. I show you this compendium and ask you what that is (handing).

A. That is my Reader's Digest file.

Q. In addition to Reader's Digest, Consumers Reports, Time Magazine, Newsweek Magazine, what did you do with other magazines?

A. I was aware from looking at other materials that this was not the entire universe of magazines in which this discussion took place, and so I devised a method to try to broaden the circle a bit, and I had my research assistants go to the Reader's Guide Index and mark for me all articles on this subject, and then I made a judgment as to which articles I wanted to add to my database so that I could read them, then they went and got them.

Q. Were you ever instructed by anybody, any lawyers, as to what or what you could not look at in connection with this decision of yours?

A. No, and I would never have been here today if I had been.

Q. And as a result of that activity, did you

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by: www.industrydocuments.ucsf.edu/docs/sxxl0001

obtain articles from other magazines?

A. I did. One of the articles that we added to this core collection, for example, at least one, the one on from Harper's Magazine was secured in that way.

Q. You also testified to a Collier's Magazine article in 1950, is that correct?

A. That's another one secured in that way.

Q. I show you this compendium and ask you whether you can identify this (handing).

A. This is that collection. I believe my research assistant has two or three of these, but this is that collection of general articles from that search.

Q. I think you also mentioned in your testimony Life Magazine as well.

How did you research Life Magazine?

A. In the same way, from the Reader's Guide to the stories in the library at UC Santa Barbara and Xeroxing the magazines there.

Q. In addition to the magazines you've just discussed, and the New York Times which you've discussed, did you at some time make a search for Boston newspapers?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. I did not, but I --

Q. Did you request --

A. I decided I wanted more newspapers. The New York Times is a good start, and it was about this time that you're speaking of that it was -- that I was informed that there was a possibility of a Boston case and would Boston newspapers be useful.

Well, the Boston Globe is a respected newspaper, I knew that, it has a national reputation, I said that would be a good newspaper for me to have.

The Herald is a large newspaper, and the research firm did the same thing with those two newspapers as it had done with the New York Times; went through and pulled out the articles that were found.

Q. That was done with respect to what newspapers, do you know?

A. The Boston Globe and the Boston Herald at that time.

THE COURT: This research firm was centered in Santa Barbara, you say?

THE WITNESS: It is, yes, sir.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: But you didn't receive the documents directly from the research firm?

THE WITNESS: No, I did not.

THE COURT: You got those from the law office?

THE WITNESS: Yes, sir. They were sent from Santa Barbara to the law offices and back to me.

BY MR. LANE:

Q. You told the lawyers what you wanted, is that right?

A. I made all these decisions, and when the research firm was required they were told to do their part and then I got the results. I did a lot of this myself and they did some. It's a time saver, believe me.

Q. So you received what you believe to have been the product of the research firm sent to you by the lawyers who were engaging the research firm, is that correct?

MR. NISSEN: Objection.

THE COURT: Overruled.

That's what he's already said.

BY MR. LANE:

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. Just for clarification.

A. Yes.

Q. And I'm showing you two bound volumes and ask if you can identify those.

A. This is the Herald, and that is the Globe.

Q. Now, did you do any validation to see or to check whether or not you were getting a complete set of the Herald and the Globe?

A. Yes.

Q. What did you do?

A. For the same reasons I went through to be sure, and the Herald and the Globe doesn't have an index, and in this period they are not in my library at Santa Barbara, they are in the library of Congress, and I spent many hours in the library of Congress turning the microfilm.

Q. What's in the library of Congress?

A. The Boston Herald and Boston Globe.

Q. In what form are they in the library of Congress?

A. Microfilm.

Q. So if you wanted to find out what -- if you wanted to find out articles in the Boston Globe in the library of Congress, how would you do it?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Substantial portions of www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Well, I had this, which purports to be every article, so I went to the microfilm to the library, and I used my same method four months out of every year, if they said there was an article there I went into the microfilm to see if it was there just as they said, and to see if there were others that weren't there, just as I spoke before.

Q. You were at the library of Congress of the United States?

A. I had to go there to do this because in California we found we had an incomplete run of the Globe.

Q. Where was the library of Congress?

A. Washington, DC.

Q. Can you give us an estimate as to how much time you personally spent in the library of Congress on this project on validating the Globe and Herald collection?

A. I suppose 30 hours.

Q. Did you have others assisting you also in that project?

A. That part I did myself, that part I did myself.

Q. The Globe and the Herald?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

A. Yes.

Q. And based upon that, do you believe that, as a result of your validation process, do you believe that what you have is a full set of Boston Globe and Boston Herald articles on the subject that we've been discussing?

A. Yes.

Q. At some point later -- by the way, in addition to the Herald, the Globe, the New York Times and all the magazines you discussed, did you make any investigation as to the types of coverages in other newspapers in the United States?

A. Yes, I did.

Q. How did you do that?

A. It occurred to me that perhaps west coast newspapers would be different, and so in order to determine whether that was true I selected eight major occasions of medical research reports, on the controversy around them, through this story, and I had research assistants go to the two major newspapers, the Los Angeles Times and the San Francisco Chronicle, to determine if their coverage had been comparable to the coverage on the east coast.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. And did you get any reports or results of that investigation into the San Francisco Chronicle or the Los Angeles Times?

A. Yes. I found that they, both papers, covered every one of those major episodes, except the Los Angeles Times missed the first one, and the San Francisco Chronicle was very weak on the last one, but there didn't turn out to be any coastal difference.

Q. When you say the first one and last one, what are you referring to?

A. The first event that I selected was the Graham/Wynder paper in JAMA in of May, 1950, and the Los Angeles Times didn't pick that up, but they picked up the rest.

Q. When you say "the last one," what are you referring to?

A. I said on the last one the San Francisco Chronicle seemed to almost have missed it, but it was the Royal College of Surgeons report in 1962.

Q. Which you described in your testimony to other newspapers, is that correct?

A. Yes.

Q. Now, in addition to the Boston Globe and

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

the Boston Herald, at some time did you make a request for any further newspapers?

A. I am not a resident of Boston and have had to learn after a while that there are other newspapers in Boston, and when I learned that there were I requested that they be given to me for the best possible grasp of what the Boston papers were doing.

Q. And as a result of that request, what, if any, newspaper information did you receive?

A. Those appear to be my copies of the Advertiser, the American, and the other Boston newspapers that I learned about.

Q. I'm going to show you these volumes and ask whether you can identify those (handing).

A. The Sunday Advertiser, the Record American. The dates are here, they don't cover the entire period. Daily Record, Boston American, Boston Traveler. That one does cover the entire period.

Q. Now, when you had assembled all of this data and material that we've been discussing here for the last short while, what did you do with all of these materials?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A. I had taken notes and absorbed, and here we come to the essence of a historian's task, is to select --

Q. Did you read them all?

A. I read them all and many of them twice. Of course I read right through as they came.

Q. After you had read them all, whether once or twice or more, what did you do?

A. I had been taking notes right along, and I put things in my head.

And, as I say, here comes the real challenge of what the historian does, it's time now to take this mass of information and get it down, synthesize it down into a representative sample that tells the story fairly, and I began to do that by -- I had a package of notes, but I don't seem to have brought them to the stand.

Q. I'll show you these. I don't know whether this is what you're referring to or something else.

A. No. These are some of my notes, most of my notes.

I took from my notes and I synthesized down to about 200 items which I thought told the story fairly and represented fairly the major events

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

of the story as it went through.

Q. And following that, what did you do with these 200 items or so?

Q. I told the lawyers that this was my first version of the story condensed down into the essence of these articles which illustrate the major developments and the major players and major themes, and then it became obvious to me from talking with them that I had too many.

Q. So what next did you do?

A. I one more time took that story down to 35 items, which in my judgment reflect the major themes, not every part. There are parts that aren't there, but the major themes, the major players as the controversy moves through the years, and the 35 items which I selected are the items that are here.

Q. To do this selecting, if you will, Doctor, and to do this research, did you employ methods which you have used in your other researches and writings in the field of history?

A. Yes. All of these methods are familiar to me and they are the methods that I use.

Q. And did you devote any less effort or skill to the development of the presentation here in court

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library
http://www.industrydocuments.ucsf.edu/docs/sxxl0001

than you devote to your writings in the field of history?

A. Frankly it felt like it was harder, but comparable efforts, the same techniques, the same steps.

MR. LANE: I have no further questions, your Honor.

MR. NISSEN: A few, your Honor, if I may.

RECROSS EXAMINATION

BY MR. NISSEN:

Q. Mr. Graham, prior to this case, the Kotler case, you were working on another case for the tobacco company, correct?

A. No.

Q. This is the first case you worked on?

A. Yes.

Q. Well, you testified that when you learned this was a Boston case, you decided to look into Boston.

When was that?

A. That would have been late summer or early fall, August or September, I think. I didn't keep a diary, but that's my memory.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. What were you doing the research for prior to that?

A. Prior to that it was general research to inform the lawyers about history, and it was never clear to me what they would do with my research, but they wanted general research in the history of tobacco, tobacco's representation in American life, and they wanted research of that, especially into the cigarette and its reputation.

So I spent several months doing this general reading and formulating my findings.

Q. Was this general reading, Mr. Graham, included in the 200 to 220 hour estimate, or is that something besides that?

A. That is included in the estimate. As I think I said in response to your questions on Friday, I teach a course in the business school in which I teach one case on tobacco, just one, and so I would occasionally read a book or two that I thought I was reading for my teaching, and I wouldn't bill it to the lawyers, so there was some extra hours there that I just did it.

Q. Over the weekend, how many hours did you spend in assembling the materials that you brought

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

in today?

A. Over this weekend?

Q. This past weekend.

A. I had very few hours at home. I think packing this up took me a couple of hours, and that's about all the time I had.

Q. Do you have any information, Mr. Graham, that leads you to believe that George Kotler ever read the New York Times?

MR. LANE: Objection. Objection, your Honor.

THE COURT: Overruled.

A. I have no information one way or the other.

BY MR. NISSEN:

Q. In fact, you don't know because you didn't read any of the depositions of Mrs. Kotler, her children, Mr. Coveny, Marie Nagle, his sister, isn't that correct?

A. No, that's not correct. I read, as I said, I think on Friday, I read Mrs. Kotler's deposition, and I recall from it that he was a reader of magazines. I remember some of the magazines, and he was a reader of the Boston papers. But when you ask me about the New York Times, I do not recall

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

anything about that.

Q. Who gave you the deposition that you read? You said that you read a deposition and you're aware that there were five days that Mrs. Kotler was questioned by lawyers for the Defendant. And you told us you didn't read all five.

Who chose the volume that you read?

A. I must correct myself. When I went back to my files I found that I had five volumes of her testimony, and -- of her deposition, and I had read through it. I forgot that it was that much.

Q. And you read all of them?

A. I read all of them.

Q. Is it your memory that there were five or six volumes?

A. It's my memory that there were five. I could be off.

Q. Mr. Graham, you said that you validated the Boston Globe and the Boston Herald.

When was that?

A. Whenever I was in Washington and had some time for an afternoon at the library of Congress I would do it, so it stretched out over two or three visits.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Q. When in time would that be?

A. In the fall.

Q. And that was after you had been retained to participate in this case by Chadbourne & Parke?

A. By that time I knew that there was this case, this Boston case, I knew about that, and I knew that my research had a bearing on it.

Q. Mr. Graham, you say that your research in this case was similar to research you performed in other historical investigations, is that true?

A. Yes. The methods are the same. The subject matters are, of course, different.

Q. Did your methods include using lawyers as intermediaries in your other research projects as a historian? Name one for the jury, please.

A. Name one?

Q. One project that you used lawyers as you did here.

A. I have never. I have never done that before.

Q. And your expertise in this area of expertise that you developed over the last ten or twelve months, isn't that correct?

A. With the exception of a bit that I knew

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

about a tobacco industry case in the thirties that I used in the business school, with the exception of that information that I knew and that knowledge, that is correct.

MR. NISSEN: No further questions.

THE COURT: Thank you.

You're excused.

Is there a presentation on the part of the Defendant?

MR. LANE: We have no evidence through live witnesses, your Honor. We have no other witnesses to call.

I think we would like to do a reading from the Surgeon General. There were some exhibits to be put in.

THE COURT: Let's do it.

MR. LANE: Thank you.

As a preliminary matter I'd like to offer, which was discussed before, the office notes of Doctor Hilgenberg which was raised at the time of his examination. They were never marked at that time. They've been identified, your Honor.

THE COURT: Any objection to Doctor Hilgenberg's office notes?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Guidelines at www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. NISSEN: Of who?

MR. LANE: Doctor Hilgenberg.

MR. NISSEN: Of Mr. Kotler?

MR. LANE: Mr. Kotler. It's a pre-stipulated document.

THE COURT: Any objection?

MS. LUMSDEN: Can we see what he has in his hand, your Honor?

MR. LANE: (Handing).

(Pause.)

MS. LUMSDEN: Your Honor, there's some correspondence in here, this is not just office records.

THE COURT: Let me see.

(Pause.)

(Side bar conference.)

MR. LANE: These were identified at Doctor Hilgenberg's deposition as his office records with respect to his care and treatment of George Kotler, and they were an exhibit there, and then they were pre-identified in a pretrial stipulation with no objection made. It was just a formality to put them in the exact form in which they were identified at Doctor Hilgenberg's deposition.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. SHEFFLER: Also here.

THE COURT: There's also only one letter.

MS. LUMSDEN: There is more than one.

THE COURT: Where is the other? There's a letter to Doctor Philzer.

MS. LUMSDEN: There's other letters. I don't know exactly what they are.

THE COURT: There's a second letter to Doctor Philzer.

MR. LANE: You've never made objection to it is my point before the pretrial. These were identified without objection in the pretrial stipulation.

THE COURT: I think these letters are summaries of his findings.

MS. LUMSDEN: I didn't know what they were, your Honor. I noticed the letters in there.

THE COURT: So you're going to object anyway?

MS. LUMSDEN: No.

THE COURT: There's another letter to Doctor Philzer, again a report of the findings, which is perfectly proper.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

A letter to Doctor Choi, it shows the increase, he's doing amazingly well.

Here's an operative report of December, '84, radiological consultation.

Another letter to Doctor Philzer of 1984, reports.

MS. LUMSDEN: Your Honor, it's hearsay. The witness was on the stand.

MR. SHEFFLER: He identified them on the stand.

THE COURT: Come on, his medical records are admissible. What do you want to keep them out for?

MS. LUMSDEN: I'm not saying --

THE COURT: Just because they want them in?

MS. LUMSDEN: There's something to that, your Honor.

THE COURT: This is all the same stuff that he testified to, and medical records, historically and traditionally even before the present rules, were admissible.

MR. LANE: And worse, there was no objection in the pretrial stipulation.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: Let's not fool around here.

MR. LANE: Would you have that marked as the next exhibit, please?

THE COURT: What's the basis of your objection?

MS. LUMSDEN: Your Honor, it's hearsay, it's all hearsay, number one. Number two, it has correspondence and letters.

THE COURT: That's his way of keeping records. I'll let it stand. I think that's a silly objection, to tell you the truth.

The objection is overruled.

(End of side bar conference.)

(The document was marked Defendants' Exhibit 14 in evidence.)

MR. LANE: Another document, your Honor, I'd like to introduce is the x-ray report of the Cambridge Hospital, x-ray reports, they were discussed in the testimony of Doctor McHugh, I believe.

THE COURT: Any objection?

MS. LUMSDEN: Could I just see it?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: Was this identified in the examination of one of the doctors?

MR. LANE: Doctor McHugh, I believe. And also it was in the pretrial stipulation.

THE COURT: That doesn't do it if it hasn't been identified.

MS. LUMSDEN: Your Honor, I have a problem. I can't read this copy. There's no date I can make out.

THE COURT: Do you have a better copy of it?

Let's see it.

(Side bar conference.)

THE COURT: What's the problem?

MS. LUMSDEN: I don't know the date.

THE COURT: It looks like ten something. Maybe there will be something else in here.

MS. LUMSDEN: They are from various years, your Honor. Nobody's referred to some upper GI series he had in '82 or lower GI series, and that's in there.

MR. LANE: There's a series of x-ray reports, your Honor, at various intervals of Mr.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Kotler, and one was referred to in the testimony of Doctor McHugh, I believe.

MR. SHEFFLER: Doctor McHugh referred to '77, '78 and '81 chest films. The '81 chest film I think is a page in there.

THE COURT: Here's '77.

MS. LUMSDEN: No one, to my knowledge, referred to one in '77, your Honor.

THE COURT: Here's one for '82.

MS. LUMSDEN: I don't know if it's upper or lower GI, no one referred to that.

MR. SHEFFLER: I think it's --

THE COURT: There's no testimony what all this stuff means. I'm not going to let it go in cold.

MR. SHEFFLER: As far as the one chest film, your Honor, there was a --

THE COURT: Objection sustained.

(End of side bar conference.)

MR. LANE: I would like to offer, if I might, the hospital records of the Cambridge City Hospital which were also premarked, if your Honor please.

MS. LUMSDEN: For what period?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MR. LANE: We'll approach the bench.

(Side bar conference.)

MR. LANE: Eighty-four, if I'm not mistaken.

There was an entry with respect to his 1976 hernia operation when he was admitted, and the history taken as part of admission is that he told the admitting intern that he stopped smoking for seven months and had resumed about two months ago, and it was part of his treatment history of this patient.

THE COURT: That isn't -- that doesn't qualify as a prior inconsistent statement. It's a statement. These things --

MR. LANE: I think it makes George Kotler a witness in this case, so to speak.

THE COURT: No, he isn't. It is double hearsay.

MR. LANE: I thought the rule was that evidence taken in the course of diagnosis and treatment --

THE COURT: Which are pertinent.

MR. LANE: Which are pertinent.

THE COURT: This is not pertinent to

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

the thing for which he was being treated at the time.

MR. LANE: Well, it was part of his history.

THE COURT: Exclude it.

(End of side bar conference.)

THE COURT: Objection sustained.

MR. SHEFFLER: Your Honor, if I may read from the Surgeon General's Reports.

THE COURT: Sure.

MR. SHEFFLER: The Surgeon General's Report dated 1964, in the forward, page five, "Since the turn of the century, scientists have become increasingly interested in the effects of tobacco on health. Only within the past few decades, however, has a broad experimental and clinical approach to the subject been manifest; within this period the most extensive and definitive studies have been undertaken since 1950.

"Few medical questions have stirred such public interest or created more scientific debate than the tobacco-health controversy. The interrelationships of smoking and health undoubtedly are complex. The subject dots not lend itself to

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

easy answers. Nevertheless, it has been increasingly apparent that answers must be found."

Continuing on in the '64 report on page five, "In the early part of the 16th Century, soon after the introduction of tobacco into Spain and England by explorers returning from the New World, controversy developed from differing opinions as to the effects of the human use of the leaf and products derived from it by combustion or other means. Pipe smoking, chewing, and snuffing of tobacco were praised for pleasurable and reputed medicinal actions. At the same time, smoking was condemned as a foul-smelling, loathsome custom, harmful to the brain and lungs. The chief question was then and is it now: Is the use of tobacco bad or good for health, or devoid of effects on health."

The 1989 report, in the preface, "Exactly 25 years ago, on January 11th, 1964, Luther L. Terry, MD, Surgeon General of the US Public Health Service, released the report of the Surgeon General's Advisory Committee on Smoking and Health. That landmark document, now referred to as the first Surgeon General's Report on Smoking and Health, was America's first widely publicized official

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

recognition that cigarette smoking is a cause of cancer and other serious diseases.

"The circumstances surrounding the release of the first report of 1964 are worth remembering. The date chosen was a Saturday morning, to guard against a precipitous reaction of Wall Street. An auditorium in the State Department was selected because its security could be assured -- it had been the site for press conferences of the late President John F. Kennedy, whose who assassination had occurred less than two months earlier.

"The first two copies of the 387 page, brown covered report were hand delivered to the west wing of the White House at 7:30 on that Saturday morning. At 9:00, accredited press representatives were admitted to the auditorium and 'locked in,' without access to telephones. Surgeon General Terry and his Advisory Committee took their seats on the platform. The report was distributed and reporters were allowed 90 minutes to read it. Questions were answered by Doctor Terry and his committee members. Finally, the doors were opened and the news was spread. For several days, the report furnished newspaper headlines across the country and lead

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

stories on television newscasts. Later it was ranked among the top stories of 1964."

Finally, on page 419 of this 1989 Surgeon General's Report, "In 1964, AMA officially called smoking 'a serious health hazard' and recommended that health education programs on smoking be developed by AMA and be made available to the public through the media. However, no funds were appropriated to support the anti-smoking campaign. AMA opposed the addition of warning labels to cigarette packages, stating in a 1964 letter to the FTC that 'the health hazards of excessive smoking have been well publicized for more than ten years, they are common knowledge.'".

Thank you, your Honor.

MR. LANE: Your Honor, we would like to have read in in a question and answer fashion some of the deposition testimony of Joanne Kotler.

THE COURT: All right.

MR. LANE: We'd like to, if we might, call upon Mary Yelenick.

THE COURT: To give the answers?

MR. LANE: To give the answers, your Honor.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

THE COURT: Fine.

MR. LANE: This is a reading from portions of the deposition transcript of Mrs. Joanne Kotler.

"Q. Did you ever have a good sit down heart to heart conversation with your husband as to why he was smoking in the first place?

"A. No, sir, I did not.

"Q. Did you ever have any discussion with your husband as to why he started smoking?

"A. No, sir, I did not.

"Q. Did he have any discussion with you as to when he first began --"

MS. LUMSDEN: Could I just know, I'm sorry, where you're reading from? If you're going to another volume?

MR. LANE: We tried to put these in order. Did we give you a set?

MS. LUMSDEN: Yes, just give me a second.

MR. SHEFFLER: (Handing).

MS. LUMSDEN: Thank you.

THE COURT: Press on.

BY MR. LANE:

http://legacy.library.ucsf.edu/tid/zer07a00/pdf Document hosted at www.industrydocuments.ucsf.edu/docs/sxxl0001

"Q. Did he have any discussion with you as to when he first began to smoke Pall Malls?

"A. No.

"Q. Or the circumstances under which he began to smoke Pall Malls?

"A. No.

"Q. Did he tell you why he smoked Pall Mall?

"A. No."

MS. LUMSDEN: Your Honor, this was the part where I asked to read those.

THE COURT: The two lines? Put in the two lines.

MR. LANE: Let's make sure we have the right lines.

THE COURT: Twelve and thirteen, I recall.

MS. LUMSDEN: Three to ten.

BY MR. LANE:

Q. Page --

THE COURT: You were going to do line ten and you were going to pink up at fourteen. Do the four lines in-between.

BY MR. LANE:

Q. Starting at line three at page 68.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by www.industrydocuments.ucsf.edu/docs/sxxl0001

"Q. Can you provide any or can you sum up for us in any way the total content of the information you received from your husband over your years with him about his early smoking history?

"A. He had on occasion mentioned that he started smoking at age eleven, and as a matter of fact, he had smoked Pall Malls since age eleven.

"Q. Did he tell you why he smoked Pall Mall?

"A. No.

"Q. But he made some comment about inhaling the Pall Mall that was good or bad?

"A. Good.

"Q. Good?

"A. Yes.

"Q. He liked it?

"A. Yes.

"Q. Now, by 1966, you were purchasing cigarettes for George on a fairly regular basis?

"A. Yes.

"Q. Did you become aware sometime of a warning on the side of a pack of cigarettes?

"A. Yes.

"Q. Do you recall the name of the person who was giving the warning?"

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MS. LUMSDEN: Your Honor, I thought we were to read the two lines between.

BY MR. LANE:

"Q. Did you become aware sometime of a warning on the side of a pack of cigarettes?

"A. Yes.

"Q. Do you recall what the warning said?

"A. No, I don't remember.

"Q. Do you recall the name of the person who was giving the warning?

"A. Yes.

"Q. Who was that?

"A. Surgeon General.

"Q. The first time you saw it on there, were you surprised?

"A. I don't recall.

"Q. Had you heard something about the Surgeon General's Report before you saw that on there?

"A. Had I heard? Yes.

"Q. Can you tell us why you weren't surprised?

"A. I don't know.

"Q. But when you saw a warning from the Surgeon General you weren't surprised?

"A. I wasn't surprised because they had been

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

writing about it before he came out and made the actual thing, wasn't it? I mean, there was problems with the cigarettes and stuff.

"Q. You heard about it?

"A. Yes, through these articles, right.

"Q. But it was prior to seeing the warning?

"A. Yes.

"Q. And the articles pertained to some report by the Surgeon General; is that your best memory?

"A. Yes.

"Q. Well, George brought home the Boston Herald and the Boston Globe every day; didn't you tell us that?

"A. Boston Post and the Boston Globe, I believe.

"Q. When the Post went out of business he brought the Herald?

"A. Yes.

"Q. And did you read these papers?

"A. Most of the time.

"Q. Do you think that's where you may have read something about the Surgeon General's Report?

"A. I have no idea where I first saw it, no.

"Q. You saw it but you don't remember where; is

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Library www.industrydocuments.ucsf.edu/docs/sxxl0001

that it?

"A. That's right.

"Q. You don't recall --

"A. I don't recall where I first heard about it. I really don't.

"Q. And you don't recall whether it was in a magazine or a newspaper?

"A. I'm trying to think if it was maybe on TV.

"Q. TV?

"A. It may have been on TV.

"Q. Did you discuss that with George at all?

"A. I may have said have you heard what was on TV, or something, but it was never a discussion in our house.

"Q. Were you concerned when you heard about it?

"A. I don't remember feeling -- I must have been concerned but I don't remember it having that much of an impact on me.

"Q. You were a smoker?

"A. Yes.

"Q. A light smoker you regarded yourself?

"A. Yes.

"Q. And you regarded George as a heavy smoker, right?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

"A. Yes, I did.

"Q. Were you concerned about George?

"A. I don't recall feeling that way at the time.

"Q. You don't recall?

"A. No.

"Q. Did your husband ever express to you a concern about his own cigarette smoking?

"A. No.

"Q. You bought different packs of cigarettes at different times maybe for a period of fifteen or twenty years yourself?

"A. For both of us.

"Q. Did you buy Benson & Hedges for both of you?

"A. Yes.

"Q. Did you buy L&Ms for both of you?

"A. Yes.

"Q. Did you buy cigarettes for both of you in the eighties?

"A. Yes.

"Q. Did you have any discussion with George about any warning on a pack of cigarettes at any time?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

"A. No, not that I can recall, no.

"Q. Did you talk about his health from time to time?

"A. What do you mean, about his health?

"Q. Well, any problems he had, how he felt.

"A. Not that I can remember.

"Q. And whether he smoked too much for his health?

"A. No.

"Q. Never talked about that?

"A. No.

"Q. About the time he told you he was getting tired of Pall Malls --

"A. Yes.

"Q. -- that he tried other brands?

"A. Yes.

"Q. And at some point he selected L&Ms; is that your understanding?

"A. Yes.

"Q. And after you became aware that he was smoking -- well, not in time, but-- well, you were going to check that for me. Were you able to remember when that change was made?

"A. It was late in the sixties, like '67, '68.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

"Q. Was it three years that he was smoking L&Ms?

"A. Approximately, yes.

"Q. So '67, '68, somewhere in there?

"A. Yes.

"Q. And at that time he was still working at the Boston Woven Hose?

"A. Yes.

"Q. Then in '70, '71 he switched to Benson & Hedges, which he did like?

"A. Yes.

"Q. So from '70, '71, he smoked only Benson & Hedges, as far as you know?

"A. Yes.

"Q. Do you remember why it was that he switched to Benson & Hedges cigarettes?

"A. Yes.

"Q. Why was that?

"A. He said they were filtered and that they were safe.

"Q. Do you know what he meant by safe?

"A. No, I don't.

"Q. Did you have a feeling at some time that cigarettes were unsafe or that some cigarettes were

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the Industry Documents Library: www.industrydocuments.ucsf.edu/docs/sxxl0001

habits?

"A. The question is not clear.

"Q. Getting up and going to sleep, attending work, his relationship with you?

"A. He always went to work.

"Q. Did he change his relationship with you in any way as a result of this visit or following the visit?

"A. No.

"Q. Did he change his mood or behavior with respect to you and/or the children?

"A. Not that I can recall.

"Q. Did you -- I may have asked this already -- did you accompany him to the second visit?

"A. Yes.

"Q. Did he discuss with you the results of the second visit?

"A. Yes.

"Q. What did he say?

"A. He said 'my heart is fine.'

"Q. Did he discuss with you anything else?

"A. No, sir.

"Q. Did he discuss with you whether he would make a continuing effort to stop smoking?

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

unsafe?

"A. At that time?

"Q. Yes.

"A. Yes.

"Q. Was it your sense at the time that your husband had the feeling that cigarettes, or some cigarettes, were unsafe?

"A. Yes.

"Q. Do you know what basis he had for that feeling?

"A. Yes.

"Q. Please explain.

"A. The Attorney General, or -- not the Attorney General.

"Q. The Surgeon General?

"A. Some doctor had been coming out and saying that there were some things about cigarettes -- I don't even remember what the warning was or what it was about the cigarettes at the time. And I recall at that time a lot of people changing to a filter cigarette.

"Q. And when did you first begin to receive any suggestion from your children or any of them that they were getting information at school with respect

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

to the risk between --"

MS. LUMSDEN: Your Honor, this is again the part that's already --

THE COURT: Yes. We've excluded that.

MR. LANE: Thank you.

This is volume two, page 65.

"Q. What did your husband say to you that Doctor Dow said to him about stopping smoking?

"A. To stop smoking. To try and stop smoking.

"Q. Did you get the impression from your conversation with your husband that the direction of the doctor to stop smoking was a serious instruction'

"A. No.

"Q. Did your husband indicate to you that he thought the doctor's information about smoking in effect was medical advice?

"A. No.

"Q. Did your husband following the first visit with Doctor Dow demonstrate to you any change in his physical health?

"A. No, sir.

"Q. Did he demonstrate to you any change in his

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

"A. No, he did not.

"Q. Did he ever express to you after the second visit to Doctor Dow any concern on his part that he should continue to try to stop smoking?

"A. No.

"Q. Were you concerned yourself at any time following the second visit to Doctor Dow that he should give up smoking?

"A. No.

"Q. Did you ever at any time suggest to him that he should be giving up smoking after the second visit to Doctor Dow?

"A. No.

"Q. Did you have any discussion with your husband that both of you ought to go off cigarettes for good, if you will, as a result of the meeting he had with Doctor Dow?

"A. No.

"Q. At any time did you have any discussion with your husband --"

MS. YELENICK: I'm sorry. What page are you on now?

MR. LANE: I think I moved quite a bit ahead to volume three, page 47.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

"Q. At any time did you have any discussion with your husband over whether or not he might obtain help with respect to stopping smoking again?

"A. No, sir.

"Q. In the period from when he told you --"

There's a colloquy with counsel.

"Q. At any time in that period of time, was there any discussion between you and him as to whether or not he might obtain help of any sort to stop smoking?

"A. No.

"Q. Did you have any discussions with your friends about availability of resources to assist in stopping smoking?

"A. No.

"Q. Did you ever make any inquiry as to what resources there might be in that connection?

"A. No.

"Q. Did you ever consult or ask for advice from any doctors concerning any programs or resources?

"A. No."

MR. LANE: That completes the reading, if your Honor please.

THE COURT: All right.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

Anything further?

MR. LANE: We have nothing further, your Honor, and Defendant rests.

THE COURT: Rebuttal? Any rebuttal?

MR. INGE: No, your Honor.

THE COURT: All right. The evidence is closed on both sides.

MR. LANE: We will renew our motion, if your Honor please.

THE COURT: I'll hear you after the jury is excused.

Tomorrow morning we'll start with the arguments and charge, and I expect that you'll get the case somewhere just before lunch. How long you'll take or whether you'll finish tomorrow or the next day or the day after that, I don't know, so we will work along at a reasonable schedule until you're completed, until your deliberations are completed.

I won't keep people late at night, but I will -- unless there's some strong reason I expect deliberations will continue on through the day until complete.

Thank you very much.

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

It's even more critical than ever before that you not talk to anybody, listen or read about any comments about this case or anything related to it.

See you tomorrow morning.

(Jury excused at 1:00 o'clock p.m.)

(Side bar conference.)

THE COURT: You want to renew your motion, you say?

MR. LANE: Yes, your Honor. We are renewing our motion for directed verdict, your Honor, at the conclusion of all this evidence, and as well as you probably know I can argue at great length.

THE COURT: I'm sure you could. I think you already have.

MR. LANE: I have, and I adopt all the remarks.

THE COURT: Unless there's something -- if you've got something new you've never said before, I'll listen to you.

MR. LANE: I would have to reach to see if I have all to say on all the subjects. The difference is, which we now recognize, the Sharp

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Powered by www.industrydocuments.ucsf.edu/docs/sxxl0001

case did not change the law of the Commonwealth.

THE COURT: No, I have never said that it changed, at least I didn't think I said that it changed the formulation. It's just has changed the amount of evidence that's necessary to fill the, as I view it, the level of evidence.

MR. LANE: What I think is demonstrable here, which was perhaps not argued extensively before, that while we think the entire case of Plaintiff is speculation and conjecture shows absolutely no evidence whatsoever, which was her burden to show or her burden to show that the public was ignorant of the medical information as it was being received through the media and the press or other forms of general communication. I think there has been no showing by Plaintiff on that score whatsoever.

MS. LUMSDEN: There was a statement by Doctor Graham this morning that there was not much in the popular press in the 1940s linking cigarette smoking with lung cancer, i.e. that's true. I'm talking about the fifties.

THE COURT: Well, the jury can certainly consider whether even the imperfect

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

statistical information was sufficient so as to treat it as some kind of a warning.

MR. LANE: There's no evidence that the public was not aware of that, your Honor. It's their burden to show.

MR. BEZANSON: They weren't aware of it in the forties, your Honor, because there wasn't much to be aware of in the forties. It's a perfect match.

THE COURT: I'm going to let it go to the jury.

Motion is denied.

MR. LANE: All rights are saved.

THE COURT: To spend all this time and let it go to the jury. You can bring a motion afterwards, but if I were to direct a verdict and the Court of Appeals found out I was wrong we'd have the whole job to do again. If I allow the verdict and the jury comes in with a -- I allow the case to go to the jury, the jury comes up with the verdict, the Court of Appeals says I was wrong, that's the end of the case.

The Court of Appeals has said specifically, generally speaking, it's better

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

MS. LUMSDEN: Have you considered the possibility of unanimous with eight?

MR. LANE: We have considered the possibility of unanimous with six.

THE COURT: Well --

MR. LANE: Have you considered that?

MR. INGE: Have we considered what?

MR. LANE: Unanimous with six.

THE COURT: It's the burden -- if you want to go unanimous with eight, you have the burden of proof, it will add to your burden. I don't know why you want it.

MS. LUMSDEN: I'm not saying we did. I wondered if they'd considered it, whether that was their position, or whether it's absolutely out no matter what. That's what I'm trying to find out.

THE COURT: You can chat together. If tomorrow morning you have a contrary opinion I'll enforce the agreement. In the absence of an agreement I'll enforce the rule.

You made the schedule by the skin of your teeth.

MS. LUMSDEN: Thank you, your Honor.

THE COURT: This will go to the jury

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

tomorrow.

MR. LANE: Thank you, your Honor.

(The trial was suspended at 1:05 o'clock p.m.)

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001

C E R T I F I C A T E

I, Maureen C. O'Connor, Shorthand Reporter, do hereby certify that the foregoing transcript, Volume 16, is a true and accurate transcription of my stenographic notes taken on March 6, 1990.

Maureen C. O'Connor
Shorthand Reporter

- - - - -

http://legacy.library.ucsf.edu/tid/zer07a00/pdf
Support provided by the UCSF Industry Documents Library. http://www.industrydocuments.ucsf.edu/docs/sxxl0001